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COMPULSORY FIELD-WIDE UNITIZATION COMES TO MISSISSIPPI

Arthur B. Custy and Sam D. Knowlton II***

I. Introduction

In Mississippi, one of the legislative highlights of 1964 was the passage of a bill[1] the like of which had been urged as early as 1924,[2] and adopted as early as 1945,[3] in other oil and gas producing states. A similar bill had been specifically advocated in Mississippi, without success, in the regular legislative sessions of 1958, 1960, and 1962;[4] but the coming of compulsory field-wide unitization in 1964, heralded and possibly hastened by articles published in the *Mississippi Law Journal*,[5] was in many ways the culmination of an effort officially begun in 1932 with Mississippi's first conservation law.[6] There were, however, milestones, especially pertinent to our discussion, along the way.

The year 1948 saw the passage of a comprehensive oil and gas conservation law which contained a compulsory pooling provision limited to drilling units of forty acres.[7] This provision, the most controversial of the act,[8] was amended in 1950 to remove the acreage limitation.[9] With the legislation as it then stood, Mississippi had gone as far

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** Member of the Editorial Board, Mississippi Law Journal.

[1]Advance Sheet 8, General Acts of Miss. 1964, H. B. 456 [hereinafter cited as H. B. 456].

[2]Myers, The Law of Pooling and Unitization § 1.02, at 13 (1957) [hereinafter cited as Myers].

[3]*Id.* § 8.02, at 220.

[4]Address of Edmund L. Brunini, Meeting of Legal Committee, Interstate Oil Compact Commission, Dec. 10, 1964.

[5]Myers, *Spacing, Pooling and Field-Wide Unitization*, 18 Miss. L.J. 267 (1947); Myers, *The Necessity of Unitization*, 33 Miss. L.J. 1 (1961).

[6]Miss. Laws 1932, ch. 117, at 315.

[7]Miss. Laws 1948, ch. 256, at 235. See generally Coleman, *The New Mississippi Oil and Gas Conservation Act*, 20 Miss. L.J. 51 (1948).

[8]Winter, *The Work of the 1950 Session of the Mississippi Legislature*, 22 Miss. L.J. 1 (1950).

[9]Miss. Code Ann. § 6132-22 (1956).

as it could "to prevent waste and protect the correlative rights of owners of small tracts,"[10] but the greater problems incidental to "secondary recovery or pressure maintenance or repressuring operations, cycling operations, water flooding operations, or any combination thereof"[11] waited for their solution, or so it would seem.[12]

Then, in 1952 and 1953, a series of Mississippi decisions[13] were handed down which established a doctrine known as equitable pooling, "equitable" possibly because it was neither voluntary nor compulsory under a specific statutory provision.[14] Under this doctrine, the Mississippi court held, in effect, "that spacing regulations based on general conservation statutes, lacking compulsory pooling provisions, had the legal effect of pooling the land included in a drilling unit."[15] However, the equitable pooling decisions were almost certainly influenced, at least in part, by the prior passage of the 1948 act authorizing compulsory pooling.[16] "[T]aken together it would seem that [the decisions held] . . . that where a unit is legally formed . . . it is formed for all purposes to the same extent as if formed by . . . conservation authorities under statutes authorizing compulsory pooling."[17] Thus, any sound consideration of the equitable pooling cases in Mississippi had to be conducted in the light of the compulsory pooling legislation of 1948 and 1950 and the decisions concerning that legislation.[18]

These two landmarks in Mississippi oil and gas law, compulsory pooling and equitable pooling, are most prominent in the background as we view compulsory unitization for the first time as an accomplished fact. While the distinction between compulsory pooling and compulsory unitization is important to maintain as a matter of convenience,[19] their

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[10]Myers, *The Necessity of Unitization*, 33 Miss. L.J. 1, 3 (1961).

[11]H.B. 456, § 2(a).

[12]See Myers § 8.02 at 217 n.25 (Supp. 1963); *but see* 6 Williams & Meyers, Oil and Gas Law § 912, at 99 (1964) [hereinafter cited as 6 Williams & Meyers].

[13]Griffith v. Gulf Ref. Co., 215 Miss. 15, 60 So. 2d 518, 61 So. 2d 306, 1 O. & G. R. 1627, 1637 (1952); Hassie Hunt Trust v. Proctor, 215 Miss. 84, 60 So. 2d 551, 1 O. & G. R. 1644 (1952); Superior Oil Co. v. Berry, 216 Miss. 664, 64 So. 2d 357, 2 O. & G. R. 193, 1094 (1953); Humble Oil & Ref. Co. v. Hutchins, 217 Miss. 636, 64 So. 2d 733, 65 So. 2d 824, 2 O. & G. R. 337 (1953). See generally Gillis, *Involuntary Equitable Pooling in Mississippi*, 27 Miss. L.J. 10 (1955).

[14]6 Williams & Meyers § 906, at 36.

[15]*Ibid.*

[16]See *id.* § 906.1, at 42; Hoffman, Voluntary Pooling and Unitization 274 (1954).

[17]Myers § 3.03 at 65.

[18]See 6 Williams & Meyers § 906.1, at 42; Hoffman *op. cit. supra* note 16, at 274.

[19]See Superior Oil Co. v. Foote, 214 Miss. 857, 59 So. 2d 85, 1 O. & G. R. 735 (1952), in which Justice Ethridge, speaking for the court, drew the distinction: "This type of legislation is usually defined as a compulsory pooling statute, under

general purposes are identical: the conservation of oil and gas, the prevention of waste, the protection of correlative rights, and, an additional economic purpose, the elimination of the cost of the unnecessary well with its attendant litigation.[20]

Furthermore, it is believed that the legal similarities between compulsory pooling and equitable pooling, on the one hand, and compulsory unitization, on the other, are such that a fruitful discussion of the new act may be based on the Mississippi statutes and decisions concerning the former together with the Mississippi decisions concerning voluntary pooling and unitization and the compulsory unitization statutes and decisions of other states.[21]

Such will be the scope of this paper, after a preliminary summary of the new act and a brief comment on its provisions where called for.

II. Summary of the Mississippi Act[22]

Section 1. Upon the application of any interested person, the State Oil and Gas Board shall, after proper notice,[23] hold a hearing to consider the need for the operation as a unit of an entire field, or of an entire pool or pools within a field, for the secondary recovery of oil and gas, or both.

Comment: The limitation of a unit to "an entire field, or . . . an entire pool or pools within a field,"[24] when construed with later language of the act, may present a substantial problem. Such a limitation is normally thought to be in contradistinction to a provision, such as the one found in the Oklahoma statute,[25] limiting the unit to one common source of supply.[26] In fact, "unitization statutes appear customarily to include *some reference* to a 'common source of supply' which expressly or *implicitly* limits unitization to such a common source."[27] (Emphasis added.) The ambiguity in the new Mississippi act is created by the existence of the limitation to a "field" as quoted above[28] and by a later reference to "a common source of supply."[29] In determining which phrase is to be

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which owners of small or irregularly shaped tracts can be required by the Board to develop their lands as a single drilling unit for conservation purposes. It is contrasted with a compulsory unitization statute, which applies ordinarily to joint operations on a large scale, such as those covering an entire oil or gas pool."

[20]See Myers § 8.01, at 208.

[21]See *id.* § 13.01, at 334, § 14.02 at 366; Merrill, *Recent Unitization Cases*, 6 Okla. L. Rev. 168 (1953).

[22]H.B. 456.

[23]H.B. 456, § 8.

[24]H.B. 456, § 1.

[25]Okla. Stat. Ann. tit. 52, §§ 287.1 to 287.15 (Supp. 1964).

[26]See Myers § 8.02, at 226 (Supp. 1963).

[27]6 Williams & Meyers § 913.4, at 113.

[28]H.B. 456, § 1.

[29]H.B. 456, § 2(b).

given effect, some significance may be attributed to the wording of a still later provision, in the Mississippi statute, which states that "only so much of a *field* as has been defined . . . may be so included within the unit area."[30] (Emphasis added.) In an almost identical provision in the Oklahoma statute, the words "common source of supply" take the place of "field."[31]

If the Mississippi court should construe the new law as implicitly limiting unitization to a "common source of supply," Oklahoma's experience with that phrase would be helpful. In *Jones Oil Co. v. Commission*,[32] oil was being produced, through the same well bore, from three producing sands. It was contended that there were three common sources of supply involved. The court, basing its decision more on the spirit than on the letter of the law, held that the Corporation Commission could, in its discretion, designate three sands as a common source of supply. And in *Palmer Oil Corp. v. Phillips Petroleum Co.*,[33] the possibility of substantial migration of oil and gas from one part of the source of supply to another was set up, as one criterion, in determining the existence of a common source of supply.

Should the more liberal interpretation of the statute be taken, *viz.*, allowing unitization of "an entire field, or of an entire pool or pools within a field," it would seem that "the compulsory unitization of separate pools should be sustained whenever the combination of two reservoirs can be reasonably justified on a conservation basis and the right of each landowner to his fair share of the oil and gas in the combined reservoirs is adequately protected."[34]

Section 1. (cont.) The application to the Board shall have attached to it the plan of unitization and the agreements incorporating the provisions required, by section 3, to be included in any unitization order issued by the Board. The attached plan and agreements must have been approved in writing by eighty-five per cent of the working and royalty interest owners based on the surface acreage content of the unit area. Royalty interests owned by lessees are to be excluded in determining royalty interest owners.

Comment: The Mississippi act provides, as do most conservation acts of its kind,[35] a compromise between voluntary and forced action; but the ratio of eighty-five per cent voluntary to fifteen per cent involuntary has already received criticism as being patently unrealistic.[36] Such criticism

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[30]H.B. 456, § 3(c).

[31]OKLA. STAT. ANN. tit. 52, § 287.4 (Supp. 1964).

[32]382 P.2d 751 (Okla. 1963), *cert. denied*, 375 U.S. 931 (1963).

[33]204 Okla. 543, 231 P.2d 977 (1951), *appeal dismissed sub. nom.* Palmer Oil Corp. v. Amerada Petroleum Corp., 343 U.S. 390 (1952).

[34]MYERS § 8.02, at 226 (Supp. 1963).

[35]See MYERS § 8.01, at 208.

[36]Brunini, *supra* note 4.

would seem correct in the light of the requirements in other states, none of which is over seventy-five per cent in favor of unitization and most of which are closer to sixty-five per cent.[37]

One problem which may occasionally arise with regard to the requisite consent to the unit operation is that one person may seemingly own a large enough percentage of the working or royalty interest to satisfy the statutory requirement by himself.[38] Some statutes deal directly with the problem and require that at least one other working or royalty interest owner agree to unitization; it is conceivable that such a provision might be written into a statute which lacked it if a court were presented with a difficult problem.[39]

Where a landowner's interest is encumbered, by a deed of trust for example, there may also be a valid question as to who is qualified to give the requisite consent.[40] At least one state has covered this possibility by specific statutory provision that, in the absence of a stipulation to the contrary in the instrument, both the grantor and grantee will be considered record owners.[41]

Section 2. The Board may issue an order requiring unit operation if it finds:

(a) That unit operation is reasonably necessary in order to effectively carry on any form of joint effort calculated to substantially increase the ultimate recovery of oil and gas from the unit;

Comment: Some statutes authorize compulsory unitization only in connection with certain purposes such as secondary recovery.[42] While the Mississippi act specifies a number of types of operations for the conduct of which unitization may be ordered,[43] it would seem likely that the language of the act, authorizing "any form of joint effort,"[44] is broad enough to include, and would be interpreted to include, any situation which might arise.[45]

(b) That one or more methods of unitized operation as applied to the common source of supply or portion thereof are feasible and will prevent waste;

(c) That the plan of unitization and the agreements effectuating them are fair and reasonable under all of the circumstances and protect the rights of all interested parties;

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[37]See 6 WILLIAMS & MEYERS § 913.5, at 117-18.
[38]See *id.* § 913.5, at 119.
[39]See *ibid.*
[40]*Id.* § 913.5, at 120.
[41]*Ibid.*
[42]*Id.* § 913.1, at 107.
[43]H.B. 456, § 2(a).
[44]*Ibid.*
[45]See 6 WILLIAMS & MEYERS § 913.1.

(d) That the correlative rights of all interested parties will be protected;

(e) That the estimated additional cost will not exceed the value of the estimated additional recovery of oil or gas; and

(f) That the entire unit area has been completely and fully drilled out and developed by the drilling of one oil well on every forty acres within the unit area or one gas well on every 320 acres within the unit area. The units for oil wells shall not exceed forty contiguous surface acres and the units for gas wells shall not exceed 320 contiguous surface acres.

Comment: While this provision "seemingly strikes a heavy blow at wider spacing"[46] it is expected that its effect will be limited by construction with an alternative provision later in the act, to the effect that the wells "shall be drilled under such spacing patterns as may be provided by any special field rules adopted by said board for the field."[47] Such an interpretation would eliminate conflict on this point and would better effect the general purposes of the act.

Section 3. Any unitization order issued by the Board shall be fair and reasonable under all of the circumstances and shall protect the rights of interested parties and shall include:

(a) A description of the geographical and geological areas which constitute the proposed unit area.

(b) A statement of the nature of the operations contemplated.

(c) A formula for the allocation of production from the unit area, among the separately owned tracts, based on the contributive value of each tract to the unit area taking into account all pertinent engineering, geological and operating factors that are reasonably susceptible of determination.

Comment: "Perhaps the most frequently employed basis for allocating pooled or unitized production is surface acreage,"[48] and the Mississippi conservation act of 1948[49] is an excellent example of a statute which utilizes such a basis. The 1948 statute provides that "any allocation or apportionment of production shall be made on the basis of and in proportion to the acreage content of the drilling units prescribed for the producing horizons for the pool."[50] Surface acreage as a basis for allocation of pooled production was sustained in *Humble Oil & Refining*

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[46]Brunini, *supra* note 4.
[47]H.B. 456, § 3(c); see Brunini, *supra* note 4.
[48]6 WILLIAMS & MEYERS § 970.1, at 814.
[49]MISS. CODE ANN. § 6132-21(d) (1956).
[50]*Ibid.*

Co. v. Welborn,[51] where appellees claimed "that the sands underlying their lands are thicker and contain more hydrocarbons than the adjoining lands in the same unit."[52] Later, in *Corley v. Mississippi State Oil & Gas Board*,[53] the court noted that

> The formula of participation based on surface acres has the merit of simplicity and certainty, but is entirely fair only in the rare cases where formations are uniform in quality and thickness throughout the unit with each tract having beneath it the same amount of reserves per acre.[54]

It would seem that the Mississippi legislature's departure from the "surface acreage" principle in the new act is praiseworthy in that an increase in fairness, in this case, is probably worth an increase in complexity. At any rate, if the complexity of the "contributive value" formula should prove to be too great, it is clear that there would be no constitutional bar to a return to the "surface acreage" basis.

(c) (cont.) Only so much of a field as has been defined and reasonably determined to be productive of oil and gas by actual drilling operations may be included within the unit area. The wells drilled to determine the unit boundaries shall be drilled on forty acre spacing for oil wells and 320 acre spacing for gas wells or shall be drilled under such spacing patterns as may be provided by any special field rules adopted by the Board.

(d) A provision for adjustment among the owners of the unit area (not including royalty owners) of their respective investments attributable to the unit operation. The amount to be charged unit operations shall be determined by the owners of the unit area (not including royalty owners) or by the Board if the owners are unable to agree. The amount charged against the owner of a separately owned tract shall be considered an expense of unit operation chargeable against such tract. The adjustments provided for in this section may be handled by agreements separate from the unitization agreement. The expense of dry holes drilled within the unit area prior to the effective date of a unitization order shall not be chargeable as investment unless such dry holes are used in the unit operation.

(e) A provision that operating costs be borne by the owner (not entitled to share in production free of operating costs, who in the absence of unit operation would be responsible for operating costs) of each tract in the same proportion that such tracts share in unit production.

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[51] 216 Miss. 180, 62 So. 2d 211, 2 O. & G. R. 50 (1953).
[52] *Ibid.*
[53] 234 Miss. 199, 105 So. 2d 633, 9 O. & G. R. 481 (1958).
[54] *Id.* at 214, 105 So. 2d at 639, 9 O. & G. R. at 488.

(f) The designation of, or a provision for the selection of, a unit operator. The conduct of all unit operations, and the selection of a successor to the unit operator, shall be governed by the terms and provisions of the unitization agreements.

(g) The time the unit operation shall become effective and the manner in which, and the circumstances under which, the unit operation shall terminate.

(h) A requirement that all oil and/or gas contained in a unit area shall be produced and sold as rapidly as possible without excessive damage to the reservoir.

Comment: This subsection has been criticised as "foolish," probably ineffectual, and significant only as evidence that the historical, persistent antagonism to "proration on the basis of market demand" still remains.[55] "Obviously, the word 'sold' was inserted without thinking. Equally as obvious is the fact that no Board or Court in its right mind would tolerate damage to the reservoir."[56]

Section 4. No unitization order shall be effective until the plan of unitization and the unitization agreements have been approved as required in section one and the Board has made a finding to that effect.

Section 5. The Board may enlarge the unit area in essentially the same manner as the unit area was created.

Section 6. The portion of unit production allocated to a separately owned tract within the unit area shall be deemed for all purposes to have been actually produced from such tracts, and operations with respect to any tract within the unit area shall be deemed for all purposes to be the conduct of operations with respect to each separately owned tract. Provided, however, when an oil and gas lease contains lands only partially within the unit area, the unit agreement shall have no effect on lands lying outside the unit area, and failure of the lessee of outside lands to drill and develop those lands within ninety days from the date of the determination of the unit area by the Board shall render the lease on outside lands void.

Comment: Although in the older fields this provision may do little harm, it has been predicted that it will breed conflict in the more recently discovered fields.[57]

> Naturally the consenting working interest owners understandably will be reluctant to submit to this deprivation of their rights. Many fields, consequently, may never reach the point

[55]Address of Edmund L. Brunini, Meeting of Legal Committee, Interstate Oil Compact Commission, Dec. 10, 1964.

[56]*Ibid.*

[57]*Ibid.*

> of submission to the Board. On the other hand, the lessee who is forced by the Board into the unit, cannot be deprived willy-nilly of his rights as to his outside acreage.[58]

Section 7. From and after the effective date of a unitization order, all operations contrary to such order are unlawful and are prohibited.

Section 8. (Notice.)

Section 9. (Policy, procedure, and definitions.)

Section 10. Any interested person adversely affected by any provision of this act may obtain court review by appeal to the chancery court of the county where the land involved is situated. Such suit shall be tried anew and disposed of as any civil suit and not upon the record of any hearing before the Board.

Comment: An earlier Mississippi conservation statute provided that on appeal "the matter shall be tried de novo by the circuit court."[59] In *California Co. v. State Oil and Gas Board*,[60] the supreme court commented on this provision as follows:

> Since the Legislature had the power to delegate this function to a Board composed of the officials hereinbefore mentioned, we are of the opinion that the action of said Board . . . was as heretofore stated likewise legislative; that, therefore, the Circuit Court would be without constitutional power on appeal to substitute its own opinion as to what are proper oil conservation measures for that of the State Oil and Gas Board, on a legislative or administrative question, since the separation of executive, legislative and judicial powers, provided for by . . . the State Constitution, forbid.[61]

"One is impelled to venture that the Courts will apply the rule announced in [this case] . . . and that Section 10 will be interpreted to allow appeals from H. B. 456 on the record rather than de novo."[62]

III. The Legality of the Mississippi Act

A. Under State and Federal Constitutions[63]

Very little needs to be said about the legality of compulsory unitization on constitutional grounds which has been considered, for

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[58] *Ibid.*

[59] Miss. Code Ann. § 6136 (1956).

[60] 27 So. 2d 542 (Miss. 1946).

[61] *Id.* at 545.

[62] Brunini, *supra* note 55; see also Wade, *Recent Mississippi Oil and Gas Cases*, 18 Miss. L.J. 243, 261 (1947).

[63] See generally Moses, *The Constitutional Legislative and Judicial Growth of Oil and Gas Conservation Statutes*, 13 Miss. L.J. 353 (1941).

some time, an accomplished fact.[64] As early as 1932, it was predicted that orders creating compulsory field-wide units would be held valid.[65] Such indeed was the case, with the Oklahoma legislature in 1945 providing the first comprehensive statute under which such an order could be issued[66] and the Oklahoma court in 1951 providing a landmark decision[67] upholding the statute against all relevant constitutional objections.[68]

Furthermore, "the constitutionality of compulsory unitization is supported by the cases . . . upholding the [compulsory] . . . pooling statutes,"[69] which gives an additional, if not conclusive, reason for believing that the new Mississippi act will survive any constitutional attack made on it.

In *Superior Oil Co. v. Foote*,[70] the validity of Mississippi's compulsory pooling statute, under state and federal constitutions, was considered in detail. The court found a basis for the validity of the act in the police power of the state, including "the right to regulate and to promote development of industry and utilization of natural resources in order to add to the wealth and prosperity of the state."[71] The Mississippi court noted that the courts of other states which had considered the question had, without exception, held compulsory pooling statutes to be valid.[72] The court cited with approval *Palmer Oil Corp. v. Phillips Petroleum Co.*,[73] the landmark Oklahoma case upholding compulsory unitization, which was mentioned above. It is concluded, if we may rely on the *Foote* case, that the new act is safe, constitutionally speaking.

B. Under State and Federal Antitrust Laws

One of the earliest fears of those who wished to practice unitization, as a sound engineering and conservation measure, was that the state or federal government would bring an antitrust suit on the theory that the unitization agreement was a scheme to control production or raise

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[64]See MYERS § 8.02, at 224.

[65]*Id.* § 8.02, at 218; *but see* Hardwicke, *Oil Conservation: Statutes, Administration, and Court Review*, 13 MISS. L.J. 381 (1941).

[66]OKLA. STAT. ANN. tit. 52, §§ 287.1 to 287.15 (Supp. 1964).

[67]Palmer Oil Corp. v. Phillips Petroleum Co., 204 Okla. 543, 231 P.2d 997 (1951), *appeal dismissed sub. nom.* Palmer Oil Corp. v. Amerada Petroleum Corp., 343 U.S. 390 (1952), MYERS § 8.02, at 221.

[68]See MYERS § 8.02, at 224.

[69]*Id.* § 8.02, at 218.

[70]214 Miss. 857, 59 So. 2d 85, 1 O. & G. R. 735 (1952).

[71]*Id.* at 875, 59 So. 2d at 93, 1 O. & G. R. at 745.

[72]*Ibid.*

[73]204 Okla. 543, 231 P.2d 997 (1951), *appeal dismissed sub. nom.* Palmer Oil Corp. v. Amerada Petroleum Corp., 343 U.S. 390 (1952).

prices.[74] Were it not for the possibility that this fear still lingers in some legal minds today, even this brief discussion might be unnecessary, for there seems to have been little substance to the threat.[75] In fact, there have been no cases testing unitization under the antitrust laws of a state[76] and only one, which never reached trial on the merits, under federal law.[77]

As the predominance of federal litigation in this area suggests, there is even less basis for a fear of prosecution under state than under federal antitrust laws.[78] When a state has announced a policy of conservation to be effected by a compulsory unitization statute, for example, there is "no room left for an accusation that it is the intent of the parties to reduce production, illegally restrain trade or affect prices;"[79] and the matter is put beyond question in many states[80] by a specific provision in the conservation statute exempting a drilling or field-wide unit from the state antitrust laws. The Mississippi legislature included such a clause in the conservation legislation of 1948 and 1950[81] which reads as follows:

> Agreements made in the interest of conservation of oil or gas, or both, or for the prevention of waste, between and among owners or operators, or both, owning separate holdings in the same field or pool, or in any area that appears from geologic or other data to be underlaid by a common accumulation of oil or gas, or both, and agreements between or among such owners or operators, or both and royalty owners therein, for the purpose of bringing about the development and operation of the field, pool or area, or any part thereof, as a unit, and for establishing and carrying out a plan for the cooperative development and operation thereof, when such agreements are approved by the board, are hereby authorized and shall not be held or construed to violate any of the statutes of this state relating to trusts, monopolies, or contracts and combinations in restraint of trade.

The 1964 compulsory unitization statute does not itself contain such a clause, but the statutory language of 1948 and 1950 would seem ample as an expression of legislative intention should the problem ever arise. And, while the fact that a unit is being operated under a compulsory statute does not render it immune from federal antitrust suits, such a

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[74]See MYERS § 12.01, at 315; Hardwicke, *supra* note 65, at 406.

[75]See MYERS §§ 12.01-12.05.

[76]MYERS § 12.04, at 326.

[77]United States v. Cotton Valley Operators' Comm., 339 U.S. 940 (1950), rehearing denied, 339 U.S. 972 (1950), 6 WILLIAMS & MEYERS § 911, at 89-90.

[78]See MYERS § 12.04.

[79]*Id.* § 12.04, at 327.

[80]See 6 WILLIAMS & MEYERS § 911, at 93.

[81]MISS. CODE ANN. § 6132-22(e) (1956).

unit would be much less vulnerable to attack than would a voluntary unit.[82]

Although it is a fair conclusion that even the federal antitrust dangers to compulsory unitization are minimal,[83] there are several points which should be remembered in order to stay on the safest possible ground. For one thing, any semblance of price fixing should be carefully avoided.[84] "This means no cooperative marketing of unitized substances or products thereof, no common sales agent, and no agent for negotiation"; each operator should take his share in kind and dispose of it himself.[85] For another, the conservation purposes which are to be accomplished by unit operation should be set out in detail in the unitization agreement.[86] Finally, care should be taken to see that the order of the Board, setting up a compulsory unit, covers every detail of the operation sought to be protected from a possible antitrust suit.[87] It should be emphasized, however, that "regardless of the terms of the agreements the antitrust laws may nevertheless be violated by the participants in the unit . . . . What they agree to may be legal, but what they do, may not be."[88]

IV. The Nature of Compulsory Unitization in Mississippi

A. The Compulsorily Unitized Title—Cross-Conveyance or Contract

Generally speaking, a unitization agreement, whether it is voluntary or pursuant to a compulsory order,[89] either has the effect of "giving each owner a contract right to share in the production from premises other than those he has contributed to the agreement,"[90] or it has the effect of conveying to each owner some interest in premises other than those which he has contributed.[91] The choice which a court makes between the contract theory and the cross-conveyance theory is said to determine the answer to a number of important legal questions.[92]

The choice in Mississippi, although still in doubt,[93] will evidently

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[82]See Myers § 12.04, at 326 (Supp. 1963).

[83]See *Id.* §§ 12.01-12.05.

[84]*Id.* § 12.05, at 328.

[85]*Ibid.*

[86]See *id.* § 12.05, at 329.

[87]*Id.* § 12.03, at 326.

[88]*Id.* § 14.08, at 397.

[89]See 6 Williams & Meyers § 941.3, at 649; Masterson, *The Nature of the Unitized Title*, 10 Sw. L.J. 146, 147 (1956).

[90]6 Williams & Meyers § 929, at 551.

[91]See *ibid.*

[92]See Myers § 13.01 at 331.

[93]See 6 Williams & Meyers § 930.4, at 568.

be made in favor of the cross-conveyance theory,[94] which is an "established rule of property in the State of Texas."[95] This prediction is based almost exclusively upon two cases, one a federal decision and the other a Mississippi Supreme Court case,[96] coupled with the long recognized tendency in Mississippi "to give special weight to Texas authority."[97]

In *Hudson v. Newell*,[98] a Fifth Circuit case which arose in Mississippi, the defendants in a title suit filed motions to dismiss for want of jurisdiction because certain persons were interested who were not made parties. The court made the following observations:

> The question of "unitization" and its connection with indispensable parties remains. A number of the claimants not joined have no interest unless through unitization of their lands with those in suit. . . . The question is whether the owners of other unitized lands acquired such an interest or title to those in suit that they must be joined in order to grant even partial relief. The district judge held that in Mississippi the oil in place is, as in Texas, conveyed by oil leases, royalty sales, and other formal recorded contracts, and that a unitization contract vests joint ownership jointly in all the unitized reserves in place and in the royalty oil produced from the well, citing Veal v. Thomason, 138 Tex. 341, 159 S.W.2d 472. While no Mississippi authorities in point are cited, we believe this to be correct, so that all these owners must be parties, or the unitized lands must be excluded from any decree. No adoption by plaintiffs appears of the unitization of their lands.[99]

On rehearing, the plaintiffs in *Hudson v. Newell* did offer to adopt the unitization of their lands, and the court then held that the other parties to the unit were no longer necessary parties. "This holding in no way . . . affects the conclusion earlier expressed that a unitization agreement effects cross-conveyances,"[100] but it does serve to illustrate, incidentally, why there is normally no problem of necessary parties when the land involved is unitized under a compulsory statute.[101] In such a situation, the outcome of the title suit as to one tract in the unit will not affect the interests of parties as to other tracts since the tract in question will be bound by the outcome, regardless.[102]

Merrill Engineering Co. v. Capital National Bank,[103] is the other case which has been cited as indicating Mississippi's adherence to the

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[94]See HOFFMAN, *op. cit. supra* note 16, at 157; Gillis, *supra* note 13, at 17.

[95]MYERS § 13.02, at 338.

[96]See 6 WILLIAMS & MEYERS § 930.4.

[97]See *id.* § 930.4, at 569.

[98]172 F.2d 848 (5th Cir. 1949), on rehearing, 174 F.2d 546 (5th Cir. 1949).

[99]*Id.* at 852.

[100]6 WILLIAMS & MEYERS § 930.4, at 568.

[101]See *id.* § 928, at 536.

[102]*Ibid.*

[103]192 Miss. 378, 5 So. 2d 666 (1942).

cross-conveyance theory.[104] Such a conclusion was drawn by one authority principally because "considerable emphasis was placed in the decision on such matters as the classification of royalty interests as real estate rather than personal property."[105]

A more unique view has been taken by another writer. The question in the *Merrill Engineering Co.* case was "whether the conveyance of a single tract which is a part of a unit without any mention of the unit will pass whatever interest grantor owns in other tracts in the unit by virtue of his ownership of the tract."[106] Stated differently, is the entire interest of the grantor "appurtenant to the tract contributed by him, so as to pass unmentioned with the tract,"[107] or is it "held in gross so that it must be expressly mentioned to pass"?[108] The Mississippi court held that no mention of the unit was necessary, but the court may have proceeded to its conclusion on the theory that "there was a running covenant to share royalty payments on the agreed basis burdening each tract."[109] A basis for such a conclusion would rest on the following language of the court:

> But aside from this [contract] . . . provision, it was contemplated that each block of the land should continue to be drained of oil or gas through such well or wells as might be produced on any part of the area, and we are of the opinion that in the absence of a reservation to the contrary a subsequent grantee of any part of the pooled area would be entitled to the *benefits to flow from the pooling or community agreement so long as it remained in force and effect against his land; and that this would be true without regard to whether or not such agreement made provision for the sharing of royalties by anyone other than the original parties thereto.*[110] (Emphasis added.)

While there is general approval of the result of Mississippi's "running covenant" outlook in the *Merrill Engineering Co.* case,[111] there is sharp disagreement over the effect of this outlook on the assumption that Mississippi has adopted or will adopt the cross-conveyance theory of the unitized title. One prominent authority has intimated more than once that the "running covenant" interpretation precludes the cross-convey-

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[104] 6 WILLIAMS & MEYERS § 930.4, at 568.

[105] *Ibid.*

[106] See MYERS § 13.03, at 349.

[107] Masterson, *supra* note 89, at 158.

[108] *Ibid.*

[109] See HOFFMAN, *op. cit. supra* note 16, at 180; Masterson, *supra* note 89, at 159.

[110] 192 Miss. at 398, 5 So. 2d at 672.

[111] See MYERS § 13.03, at 350; HOFFMAN, *op. cit. supra* note 16, at 180; Masterson, *supra* note 99, at 159.

ance doctrine.[112] In respect to the *Merrill Engineering Co.* case, he has specifically stated:

> It must be recognized, of course, that the Mississippi court has not held . . . that the act of pooling effects a cross-conveyance of the real property interests among the royalty owners. Thus the Mississippi court found it somewhat easier to arrive at the result which it did by treating the sharing arrangement imposed by the pooling agreement as a simple covenant running with the title to the respective tracts comprising the unit.[113]

Others disagree that such an analysis precludes the cross-conveyance doctrine,[114] and find this doctrine highly "useful in resolving the problems presented by the acquisition of a unitized interest."[115]

> A running covenant is frequently referred to as a "right in the land of another." Thus though the unitizing agreement be considered a running covenant, the situation after the making of the agreement is that each party to the unitized area has acquired an interest in the lands of the other parties. As aforesaid, to deny that this real interest was acquired by a cross-conveyance is simply to use another term for the process that has heretofore been called a "conveyance." It is believed therefore that the analysis of the unitizing agreement as a running covenant is completely consistent with the doctrine of cross-conveyancing.[116]

B. The Effect of Compulsory Unitization Upon Titles and the Construction of Instruments

We have just concluded a discussion of whether a unitization agreement, pursuant to a compulsory order, has the effect of giving to "each owner" of land included in the unit a contract right to share in production from other lands in the unit or a real interest in such other lands. That discussion should be carefully distinguished from the question of who, indeed, "each owner" is,[117] which often in turn involves an adjudication of private controversies over the validity of oil and gas leases or other related instruments.[118]

In *Hutchins v. Humble Oil & Refining Co.*,[119] the Mississippi court made it clear that neither it nor the Board had the power to adjudicate, by means of a compulsory pooling order, the property rights of ap-

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[112]Masterson, *supra* note 89, at 159.
[113]HOFFMAN, *op. cit. supra* note 16, at 180.
[114]Masterson, *supra* note 89, at 159.
[115]*Ibid.*
[116]*Id.* at 161.
[117]See 6 WILLIAMS & MEYERS § 941.3, at 649.
[118]See *id.* § 941.1.
[119]59 So. 2d 103 (Miss. 1952).

pellants, *viz.*, whether their lands were under lease when integrated.[120] The court's language is significant:

> [Appellant's] objection attacks any assumption that their interest in the production would be otherwise than as full owners of the lands. They seek a construction of the statute and of the order which fixes the interest of the owners or lessors as the same "as if the original lessors had voluntarily signed the pooling and unitization agreement."
>
> However, such view must of judicial necessity remain but an assumption. The order herein . . . adjudicated nothing as to the title of the owners of lands or leases. . . . The appeal, therefore, attacks no ruling as to whether the lease from appellants had expired, or was extended by the integration order. This is the chief, and apparently the only, concern of appellants.
>
> We are therefore without power in this proceeding to adjudicate the effect of the order upon the property rights of appellants, regardless of its importance to them. We merely uphold the order, and by hewing to the line laid down by the proceeding, leave the incidental chips of title to fall in whatever separate action they may.[121]

And in a companion, forced pooling case, *Superior Oil Co. v. Griffith*,[122] the petition to integrate the leases of appellees was filed shortly before the expiration of their respective primary terms, but the order of integration was entered afterwards.[123] In their answer to the petition appellees "joined in the prayer for integration but on condition that it be declared or assumed that the pooling order integrated them as unleased lands, or otherwise expressed, as lands upon which the mineral leases had expired."[124] The court upheld the order of the Board, as in the *Hutchins* case,[125] "but likewise without adjudicating the effect of such order upon the nature or extent of the rights of the respective owners."[126]

C. The Effect of Compulsory Unitization Upon Oil and Gas Leases

In this final section, we will be concerned primarily with the effect which the Mississippi compulsory unitization statute may have upon three related parts of the oil and gas lease—the delay rental clause, the "thereafter clause," and the implied covenant to reasonably develop. Our discussion will be further limited to the context of a situation

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120 See 6 WILLIAMS & MEYERS § 941.1, at 645.

121 59 So. 2d at 104.

122 214 Miss. 891, 59 So. 2d 104, 60 So. 2d 505, 1 O. & G. R. 758, 1664 (1952).

123 *Id.* at 899, 59 So. 2d at 105, 1 O. & G. R. at 758.

124 *Ibid.*

125 59 So. 2d 103 (Miss. 1952).

126 214 Miss. at 899, 59 So. 2d at 105, 1 O. & G. R. at 758.

specifically provided for and described in the act, *viz.*, "when an oil, gas and mineral lease contains [a tract—Blackacre] . . . partially within and partially without [the] . . . unit area."[127] Will production on the unit but not on that part of Blackacre which is within the unit continue the lease in effect as to that part of Blackacre which is without the unit after the expiration of the primary term, and therefore excuse the payment of delay rentals during the primary term?[128]

The answer is "no" if we may judge from the plain words of the statute, which are that "the unit agreement shall have no force and effect on lands lying outside of such unit area."[129] Although such an interpretation would weight the statute in favor of the lessor's interests,[130] there is nothing wrong with that, since the lessee is usually less reluctant to agree to unitization and better able to protect himself from its dangers.[131] Furthermore, such an interpretation would give effect to what was probably a legislative attempt to incorporate into the act the holding of a leading Mississippi case, *Texas Gulf Producing Co. v. Griffith.*[132]

However, as we have seen before,[133] the statute goes on to weight the situation, in an apparently unreasonable manner, in favor of the lessor. It provides, in effect, that if the lessee fails to drill or develop the outside lands within ninety days of the date of determination of the unit area, the lease will terminate.[134] Should the court feel the necessity of avoiding "this deprivation"[135] of the lessee's rights, in at least part of the cases, until corrective action can be taken by the legislature, a way out may be found in another well known case, *Wells v. Continental Oil Co.*[136]

In the *Wells* case, the court held that the lease was continued in effect as to that part of Blackacre which was without the unit, since there was production on that part of Blackacre which was within the unit.

It is believed that the court could now distinguish the effect of the statutory language, as it did the *Griffith* holding in the *Wells* case, on the

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[127]H.B. 456 § 6.

[128]See 6 WILLIAMS & MEYERS § 952, at 702.

[129]H.B. 456 § 6.

[130]See 6 WILLIAMS & MEYERS § 952, at 702.

[131]See MYERS § 14.02, at 374.

[132]218 Miss. 109, 65 So. 2d 447, 834, 2 O. & G. R. 1103, 1278 (1953). The court held that the lease was not continued in effect as to that part of Blackacre which was without the unit (in a situation where there was no actual production on that part of Blackacre which was within the unit).

[133]Notes 57-58 *supra* and accompanying text.

[134]H.B. 456, § 6.

[135]Address of Edmund L. Brunini, Meeting of Legal Committee, Interstate Oil Compact Commission, Dec. 10, 1964.

[136]244 Miss. 509, 142 So. 2d 215, 17 O. & G. R. 527 (1962).

basis of whether or not production was *actually* had on that part of Blackacre lying within the unit area. Although this would seem to leave the lessor with no remedy in a situation "where a lessee would place only a small part of a lease in a unit and thus attempt to perpetuate a much larger portion of the lease outside the unit without the necessity of paying rentals,"[137] such is not the case, for "the implied obligation to reasonably develop this outside acreage still remains."[138] "This has been recognized since the early cases dealing with the effect of unitization or pooling upon the provisions of oil and gas leases."[139]

V. Conclusion

In the preceding material we have been discussing a legislative act which is believed to be a monumental "step in the right direction,"[140] despite its "many deficiencies [and] . . . several ambiguities."[141]

By way of introduction to the new statute, we noted some analogous aspects of Mississippi's conservation history. "We indicated [also] that although it is sometimes necessary to distinguish between pooling and unitization, usually questions arising in connection with pooling also arise in connection with unitization, and the significant differences relate to whether pooling or unitization is accomplished by voluntary agreement or compulsory process."[142]

An abbreviated, paraphrased version of the Mississippi act was then set out, not only to facilitate comment by section, but also in the hope that it would make for an easier, more efficient consideration of the statute itself. Our comments, at that point, were limited to potential trouble spots in the act as indicated by the authorities in this area of oil and gas law.

Some mention was thought necessary of the statute's validity under state and federal constitutions and of its vulnerability to attack under state and federal antitrust laws. It was concluded that the new act is unquestionably sound, in its essential provisions, as far as constitutionality is concerned. Furthermore, little danger was predicted on antitrust grounds, providing due care is exercised in that area by all of the parties involved.

Finally, we attempted to apply the analogy between compulsory pooling and compulsory unitization to some of the leading Mississippi cases in order to ascertain, to some extent, what the nature of compulsory unitization in Mississippi may be.

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[137] Myers § 14.02, at 374.
[138] *Ibid.*
[139] 6 Williams & Meyers § 955.3, at 734.
[140] Brunini, *supra* note 135.
[141] See *ibid.*
[142] 6 Williams & Meyers § 941.1, at 643.

While much remains to be done by the legislature in improving the statute, certainly, much has been accomplished. Delay in putting voluntary units into effect has usually been caused by a relatively small percentage of the landowners involved,[143] and the problems arising from the non-signers have been manifold. It is unlikely that many will refuse the advantages of the new act[144] in order to realize the nebulous benefits of avoiding governmental interference.[145] Truly, "this act is now of paramount importance to the industry, the landowner and the state."[146]

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[143]See Myers, *The Necessity of Unitization*, 33 Miss. L.J. 1, 8 (1961).
[144]See *id.*
[145]See Hoffman, *op. cit. supra* note 16, at 4.
[146]Brunini, *supra* note 135.

VIEW BY COURT AND JURY

*Vardaman S. Dunn**

I. Scope of Article

This article excludes consideration of special proceedings in eminent domain, where view of the premises is mandatory unless expressly waived.[1] It also excludes any detailed discussion of view by the chancellor in equity trials.[2] Included is a detailed discussion of the statute and decisional law applicable to civil and criminal trials in the courts of law in Mississippi, and the subject is developed from both the substantive and procedural viewpoints.

II. Introduction

Although the subject is covered by statute and the procedural rules are well settled, the frequency of non-observance has provoked the supreme court, after again outlining the essential rules, to observe that "It is difficult to see why attorneys or trial judges should not follow this outlined procedure, and we admonish them to strictly observe it."[3]

Physical view of the scene of an occurrence by the court and jury in civil and criminal trials has been allowed in the absence of statute,[4] but in actions at law it is governed and regulated in Mississippi by statute.[5] The statute is reproduced below, and there follows a discussion of the case law by which the statute has been interpreted and applied.

III. The Statute

The statute dealing with the subject provides as follows:[6]

> When, in the opinion of the court, on the trial of any cause, civil or criminal, it is proper, in order to reach the ends of

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[1] Miss. Code Ann. §§ 2759, 2770 (1956).

[2] See Griffith, Mississippi Chancery Practice § 573 n.79 (2d ed. 1950); "When the chancellor by the agreement or at the request of the parties views the premises this personal inspection is a part of the testimony to be taken into consideration both by him and on appeal, thereby rendering a reversal on the facts more difficult. Glover v. Falls, 120 Miss. 201, 82 So. 4; Blair v. McMillion, 171 Miss. 33, 35, 156 So. 519. But the chancellor may not substitute an inspection of the premises made by him in lieu of a full opportunity by the parties or either of them to present their witnesses in court and to have them there heard. Hester v. Bishop, 193 Miss. 449, 10 So. (2d) 350."

[3] Armstrong v. State, 179 Miss. 235, 244, 174 So. 892, 894 (1937).

[4] 53 Am. Jur. *Trial* § 411 (1945).

[5] Miss. Code Ann. § 1800 (1956).

[6] *Ibid.*

> justice, for the court and jury to have a view or inspection of the property which is the subject of litigation, or the place at which the offense is charged to have been committed, or the place or places at which any material fact occurred, or of any material object or thing in any way connected with the evidence in the case, the court may, at its discretion, enter an order providing for such view or inspection as is herein below directed. After such order is entered, the whole organized court, consisting of the judge, jury, clerk, sheriff, and the necessary number of deputy sheriffs, shall proceed, in a body, to such place or places, property, object or thing to be so viewed or inspected, which shall be pointed out and explained to the court and jury by the witnesses in the case, who may, at the discretion of the court, be questioned by him and by the representative of each side at the time and place of such view or inspection, in reference to any material fact brought out by such view or inspection. The court on such occasion shall remain in session from the time it leaves the courtroom till it returns thereto, and while so in session outside the courtroom it shall have full power to compel the attendance of witnesses, to preserve order, to prevent disturbance and to punish for contempt such as it has when sitting in the courtroom. In criminal trials all such views or inspections must be had before the whole court and in the presence of the accused, and the production of all evidence from all witnesses or objects, animate or inanimate, must be in his presence.

It is readily noted that the statute applies in both civil and criminal cases. In both types of cases, view and inspections are to be had before the whole organized court. As a condition to the view, the court must be of the opinion that such is proper in order to reach the ends of justice and even so, it is allowed at the court's discretion.[7] The extent of the court's discretion and the factors which must govern its exercise and the procedural aspects of invoking and proceeding under the statute are subjects which have been extensively dealt with in the decisions.

IV. Constitutionality

The statute takes its present form from the act of 1894.[8] The objections raised as to its validity relate to the notion that the trial must be held in its entirety at the courtroom designated by law for holding court,[9] but there is no express constitutional prohibition against the allowance of a view outside the courthouse. The statute is not unconstitutional,[10] and no constitutional rights of one charged with a crime are

[7]Laurel Equip. Co. v. Matthews, 218 Miss. 718, 67 So. 2d 258 (1953); Parnell v. State, 211 Miss. 100, 50 So. 2d 925 (1951); Gordon v. State, 188 Miss. 708, 196 So. 507 (1940).

[8]Miss. Gen. Laws 1894, ch. 62.

[9]Bailey v. State, 147 Miss. 428, 112 So. 594 (1927).

[10]*Ibid.*

violated if the statute is followed in its essential requirements with due regard to the constitutional guarantees.[11]

V. Statutory Construction (In General)

The statute, as it applies to criminal cases, is said to be in derogation of the common law.[12] In all cases, civil and criminal, it has received a strict construction.[13] There are several reasons for the judicial disfavor toward the use of the statutory procedure: (1) The procedure may cause confusion, inconvenience, and delay;[14] (2) It is not within the spirit or genius of the law that a court shall migrate from place to place;[15] (3) The visual evidence thus supplied cannot be recorded, and the result is a limitation on the right of review on appeal.[16]

VI. Conditions for Granting

The statute[17] vests in the trial court a discretion, which, however, is not absolute. The trial court must find that the view "is proper" in order to reach the "ends of justice," but because the view when taken very nearly divests the appellate court of its power to review the case on the evidence and because of the other considerations which discourage migration of the court from place to place, the propriety of allowing a view must be so clear as almost to amount to a necessity for the attainment of justice in the particular case. Nevertheless, the action is still discretionary and fair latitude is allowed the trial judge in the determination of the propriety of the view.[18]

A request for a view should not be granted unless: (1) it appears reasonably certain that it will be of essential aid, not merely of some

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[11]*Ibid.* The accused must be present and the jury must not be separated.

[12]Jones v. State, 141 Miss. 894, 107 So. 8 (1926). *Cf.* Bailey v. State, *supra* note 9, at 435, 112 So. at 594: "The statute . . . simply gives the court the power to do that in all cases which it had at common law the power to do in certain civil cases."

[13]Great Atl. & Pac. Tea Co. v. Davis, 177 Miss. 562, 171 So. 550 (1937); Jones v. State, *supra* note 12.

[14]Floyd v. Williams, 198 Miss. 350, 22 So. 2d 365 (1945).

[15]Jones v. State, *supra* note 12; Sexton v. Coahoma County, 86 Miss. 380, 38 So. 636 (1905). It was held that the court could not, over objection, lawfully adjourn to a place other than the courthouse to take the testimony of a witness.

[16]Floyd v. Williams, *supra* note 14; Great Atl. & Pac. Tea Co. v. Davis, *supra* note 13; Armstrong v. State, *supra* note 3, at 243, 174 So. at 894: "The power of the court to review the sufficiency of the evidence is seriously hampered, if not thwarted."

[17]Miss. Code Ann. § 1800 (1956).

[18]Mississippi Power Co. v. McCrary, 179 Miss. 427, 176 So. 165 (1937). Once the discretion of the trial judge is exercised in favor of the view on substantial evidence from the record as a whole, the supreme court will not reverse unless prejudicial error is made apparent.

aid, to the jury in reaching a correct verdict;[19] (2) it is distinctly impracticable and inefficient to present the material elements to the jury by photographs, diagrams, maps, measurements and the like;[20] and (3) it appears affirmatively that there have been no material changes in the premises or objects to be viewed.[21] Even when the conditions above stated are met, considerations of inconvenience, such as distance, delay, expense, and the like, may render the view so impracticable and burdensome to the court and parties as to justify, if not to require, a refusal to allow the view,[22] and in this connection a court is not bound to allow a view because both parties request it or consent to it, since considerations of convenience and the like are left primarily to the decision of the court.[23]

The requirement most frequently involved is the one related to the physical alteration or change in the premises or objects to be viewed.[24] When there is an objection to the view on this ground, the court must hear the evidence and the condition must be fairly met, but in the final analysis, the trial court is vested with a sound discretion, and if from the entire record it cannot be said that this discretion was abused in allowing the view, the action will be affirmed. Thus, changes in the conditions at the scene will not necessarily rule out a view of the

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[19]National Box Co. v. Bradley, 171 Miss. 15, 154 So. 724, *suggestion of error overruled,* 171 Miss. 16, 157 So. 91 (1934). In Meridian Coca Cola Bottling Co. v. Illges, 187 Miss. 27, 191 So. 817 (1939), a refusal of a view was affirmed where the evidence was full and complete (foreign substance in soft drink). Mississippi Power Co. v. McCrary, *supra* note 18; Gulf, M. & N. R.R. v. Kelly, 178 Miss. 531, 171 So. 883 (1937); Great Atl. & Pac. Tea Co. v. Davis, *supra* note 13, at 570, 171 So. at 551: "[A] view is allowable only when the necessity therefor 'in order to reach the ends of Justice' bears some fair relation by way of equivalency, in that interest, to the right which otherwise would be unhampered and unimpaired to have the verdict reviewed on the record evidence." Floyd v. Williams, *supra* note 14; Gordon v. State, *supra* note 7.

[20]National Box Co. v. Bradley, *supra* note 19; Floyd v. Williams, *supra* note 14; Gordon v. State, *supra* note 7: When the scene is adequately presented by an engineer's diagram to scale, refusal of view is not error. City of Meridian v. Moody, 185 Miss. 340, 186 So. 649 (1939); Mississippi Power Co. v. McCrary, *supra* note 18; Yazoo & Miss. V. R.R. v. Lamensdorf, 180 Miss. 426, 177 So. 50 (1937), *suggestion of error overruled,* 180 Miss. 427, 178 So. 80 (1938).

[21]National Box Co. v. Bradley, *supra* note 19; Parnell v. State, 211 Miss. 100, 50 So. 2d 925 (1951); City of Meridian v. Moody, *supra* note 20; Yazoo & Miss. V. R.R. v. Lamensdorf, *supra* note 20; Mississippi Power Co. v. McCrary, *supra* note 18; Gulf, M. & N. R.R. v. Kelly, *supra* note 19; Yorkshire Ins. Co. v. Brewer, 175 Miss. 538, 166 So. 361 (1936); Franklin Fire Ins. Co. v. Brewer, 173 Miss. 317, 159 So. 545, *suggestion of error overruled,* 173 Miss. 319, 160 So. 387 (1935).

[22]National Box Co. v. Bradley, *supra* note 19.

[23]*Ibid.*

[24]See note 21 *supra.*

premises where such changes are not material to the point at issue and are not such as are likely to confuse or mislead the jury.[25]

VII. Procedure for Presenting Request for View and for Making Objections

A. Form and Contents of Application

The motion for a view may be made orally, in the absence of the jury, and transcribed into the court reporter's record.[26] It must, however, state the facts which bring the request within the application of the rules under which views are permitted, and mere statements of general conclusions, as that the view is "proper in order to reach the ends of justice" and that such would not cause undue inconvenience or delay, are insufficient.[27] If there be an objection to the view or challenge of the facts stated, the court must proceed to hear evidence touching the facts and determine therefrom the propriety of granting the request.[28]

B. Proper Procedure for Presenting Motion

The motion should be made only after the jury has retired.[29] The movant should, in the first instance, request that the jury be retired and make his motion in their absence.[30] If the motion is improperly made in the presence of the jury, the court may and should promptly overrule it without waiting for an objection, unless, of course, the opposing party promptly joins in the request.[31] If the motion is improperly made and the court improperly fails to overrule it as outlined above, then the court should, of its own motion, retire the jury.[32]

Trial courts and attorneys have been admonished to observe strictly these rules which are said to be highly conducive to the attainment of

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[25]Mississippi Power Co. v. McCrary, *supra* note 18. This case involved a view of an intersection where an accident occurred. There had been a change in the paving of the road but other physical objects remained practically the same and the change did not interfere with the jury having full opportunity to determine the point at issue, *i.e.*, the point at which the two drivers of the colliding vehicles could see each other. The allowance of a view was affirmed.

[26]Poteete v. City of Water Valley, 207 Miss. 173, 42 So. 2d 112 (1949); Great Atl. & Pac. Tea Co. v. Davis, 177 Miss. 562, 171 So. 550 (1937).

[27]*Id.* at 571, 171 So. at 552. Poteete v. City of Water Valley, *supra* note 26.

[28]Cases cited note 26 *supra.*

[29]Armstrong v. State, 179 Miss. 235, 174 So. 892 (1937); National Box Co. v. Bradley, 171 Miss. 15, 154 So. 724, *suggestion of error overruled,* 171 Miss. 16, 157 So. 91 (1934).

[30]*Ibid.*

[31]*Ibid.*

[32]*Ibid.*

justice and fair trials,[33] but up to this point, failure to comply with the proper procedure will not amount to reversible error.[34]

C. Objections

In order to put the trial court in error for an abuse of discretion in allowing a view, proper and timely objections must be made and noted.[35] If there are successive applications to the court and new evidence bearing upon the propriety and necessity of the view intervenes, the objection must be renewed with each application.[36] An objection to a request for a view by opposing counsel must be repeated when at a later time a request comes from a member of the jury.[37] An objection made out of the presence of opposing counsel is insufficient, since he is entitled to abandon his application in the light of the objection if unwilling to risk the contemplated action in view of such objection.[38] An objection made subsequent to the time that the court repairs to the premises for the view comes too late.[39]

An objecting party is entitled to make his objection and have it heard out of the hearing of the jury, as "any lawyer of experience in trying jury cases, knows the injury he inflicts upon himself in objecting to a view by the jury,"[40] and the jury may draw unfavorable inferences from the mere fact of objection.[41] If the motion to view is improperly made in the presence of the jury, and the court neither overrules it nor retires the jury of its own motion, the opposing party must request that the jury be retired.[42]

But in order that the party may avail of error in regard to objections in the presence of the jury, he must be *compelled* to so object, and, of course, the objection must actually be made.[43] If the objecting party

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[33]Armstrong v. State, *supra* note 29.

[34]National Box Co. v. Bradley, *supra* note 29.

[35]*Ibid.* Ramsey v. Natchez Coca Cola Bottling Co., 51 So. 2d 779 (Miss. 1951), where an improper request is followed by agreement that the view may be had, there is no reversible error.

[36]National Box Co. v. Bradley, *supra* note 29.

[37]*Ibid.*

[38]*Ibid.*

[39]*Ibid. But see* Armstrong v. State, *supra* note 29, at 243, 174 So. at 894: "It is not every case where there is a violation of the rules so announced that will call for a reversal."

[40]National Box Co. v. Bradley, 171 Miss. 15, 154 So. 724, *on suggestion of error,* 171 Miss. 16, 31, 157 So. 91, 94 (1934).

[41]Armstrong v. State, *supra* note 29.

[42]Hunter v. State, 183 Miss. 779, 184 So. 835 (1938); National Box Co. v. Bradley, *supra* note 29.

[43]National Box Co. v. Bradley, *supra* note 29; Poteete v. City of Water Valley, *supra* note 26, at 184, 42 So. 2d at 114: When the motion is made in the presence of the jury and in their presence the judge asks "Is this agreed upon by all of you,"

finally is compelled to object in the presence of the jury, he may be entitled to a reversal on appeal, in a case of strongly conflicting evidence, for this error alone; for, as previously noted, the jury may draw unfavorable inferences from the mere fact of objection,[44] and the prejudice thus created is at once apparent.[45]

But it is not every case where there is a violation of the rules so announced that will call for a reversal, as where in a criminal case, the view is important and appropriate and the defendant's guilt is manifest from the record evidence.[46]

D. Consent of Parties

If there is no objection or if the parties consent, there is, of course, no necessity for proof of the propriety of the view, as by demonstrating such things as the absence of material change in the premises and the like, and the impropriety of ordering a view under such circumstances cannot be availed of on appeal as reversible error.[47] On the other hand, the court has an interest, quite apart from the wishes of the parties, in the orderly and efficient conduct of judicial proceedings and is not bound to order the view even upon the stipulation of the parties.[48]

VIII. Order of Court

The statute provides that the court may "enter an order" providing for the view, and the entry of an order generally relates to the physical entry of the order on the minutes of the court, but these words in the statute were evidently used without any such technical meaning, and it is enough that the court announces that a view will be granted in accordance with the statute.[49]

It is within the power of the trial judge to regulate and guide the proceedings in any case,[50] and the order should direct, in as much detail as possible, the manner in which the court will proceed to the scene and the procedure to be followed on arrival at the scene. This could include a specification of the extent and nature of the testimony to be permitted at the scene and the number of witnesses to be allowed each party and the order of their presentation. These details

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counsel is thereby forced to object in the presence of the jury in order to respond to the question.

[44]Armstrong v. State, *supra* note 29.

[45]National Box Co. v. Bradley, *supra* note 29.

[46]Armstrong v. State, *supra* note 29.

[47]National Box Co. v. Bradley, *supra* note 29.

[48]Floyd v. Williams, *supra* note 14.

[49]McPherson v. State, 124 Miss. 361, 86 So. 854 (1921). *Cf.* Poteete v. City of Water Valley, *supra* note 26.

[50]Jackson Yellow Cab Co. v. Alexander, 246 Miss. 268, 148 So. 2d 674 (1963).

can appropriately be the product of a conference between the trial judge and the attorneys for the parties.[51]

IX. Evidence on Motion and Burden of Proof

When the motion has been made and challenged by an appropriate objection, the burden of proof and of persuasion rests upon the movant.[52] Since the motion may come at any time before the case is submitted to the jury, the record as precedently developed may or may not disclose sufficient data from which the propriety of the view may be determined.[53] In any event, the proof must meet the conditional requirements on which a view is based. Thus, trial courts have been repeatedly cautioned against permitting a view when the facts in the record do not reflect with substantial accuracy the conditions which make the view permissible under the statutory requirements.[54]

X. Scope of Discretion in Granting or Refusing

The statute vests in the court a discretion[55] in the allowance or denial of a view. The trial court is seldom, if ever, obliged to allow a view and it is a rare case that a refusal can successfully be assigned as error.[56] On the other hand, the trial court may abuse its discretion in allowing a view or act upon an insufficient showing of the conditions which must be established precedent to the allowance, and in such cases, reversible error has been readily found to exist.[57]

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[51]Once the details are settled, the court may explain the procedure to the jury to the extent deemed necessary for their understanding of what is to be expected of the jurors.

[52]Yorkshire Ins. Co. v. Brewer, 175 Miss. 538, 166 So. 361 (1936); Great Atl. & Pac. Tea Co. v. Davis, 177 Miss. 562, 171 So. 550 (1937); Gulf, M. & N. R.R. v. Kelly, 178 Miss. 531, 171 So. 883 (1937); Mississippi Power Co. v. McCrary, 179 Miss. 427, 176 So. 165 (1937); Floyd v. Williams, 198 Miss. 350, 22 So. 2d 365 (1945); Poteete v. City of Water Valley, 207 Miss. 173, 42 So. 2d 112 (1949); Parnell v. State, 211 Miss. 100, 50 So. 2d 925 (1951). A contrary rule was indicated in Franklin Fire Ins. Co. v. Brewer, 173 Miss. 317, 159 So. 545 (1935), *suggestion of error overruled*, 173 Miss. 319, 160 So. 387 (1935), where the allowance of a view was affirmed because the evidence failed to show that there had been a material change in the premises, but this decision has since been ignored.

[53]Mississippi Power Co. v. McCrary, *supra* note 52, at 439, 176 So. at 167: The trial judge may look to the "entire record."

[54]Yorkshire Ins. Co. v. Brewer, *supra* note 52.

[55]Miss. Code Ann. § 1800 (1956).

[56]Parnell v. State, *supra* note 52; Gordon v. State, 188 Miss. 708, 196 So. 507 (1940).

[57]Meridian Coca Cola Bottling Co. v. Illges, *supra* note 19; Yazoo & M. V. R.R. v. Lamensdorf, *supra* note 20; Great Atl. & Pac. Tea Co. v. Davis, *supra* note 52; National Box Co. v. Bradley, *supra* note 29.

XI. Procedure After Granting View

A. Organization of Court

Upon granting the view "the whole organized court, consisting of the judge, jury, clerk, sheriff, and the necessary number of deputy sheriffs, shall proceed, in a body, to such place or places, property or object or thing to be so viewed or inspected."[58] In criminal cases, a special proviso is made that the view must be in the presence of the accused, and it is held that even a brief exclusion of the accused from an enclosure under inspection amounts to fatal error for which a conviction must be reversed.[59] The same provision for the presence of the "whole court" applies in civil and criminal cases, but it has been held that while the absence of the clerk in a civil case is error, such, in the absence of timely objection, is not reversible error, at least where there is no occasion to call for the services of the clerk in the conduct of the proceedings.[60] Also, where the court migrates to another county in the State, a serious question arises as to whether the proceeding is by a court which is not legally organized and thus lacking in jurisdiction.[61]

B. Presence of Parties

In a criminal case, the accused has the constitutional right to be confronted by the witness against him and this guarantee requires the production of all evidence from all witnesses, animate and inanimate, in his presence. It follows that if an accused is excluded from the enclosure or locality under view, a conviction cannot stand, and it is unnecessary that the accused affirmatively demonstrate substantial prejudice.[62] But where the accused stands at the door of an enclosure under inspection, with the jury and the enclosure under his observation, this is sufficient to meet the requirement, although he does not actually enter the room.[63]

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[58]Miss. Code Ann. § 1800 (1956).

[59]Foster v. State, 70 Miss. 755, 12 So. 822 (1893).

[60]National Box Co. v. Bradley, *supra* note 29.

[61]Miller v. Ervin, 192 Miss. 712, 6 So. 2d 910 (1942). The court found it unnecessary to decide the question in view of the granting of a directed verdict but strongly suggested the lack of jurisdiction to allow a view outside of the county where the court was being held.

[62]Foster v. State, *supra* note 59. In this case the jury was allowed to inspect a railway car in which a homicide occurred. The jury was in the car for only two or three minutes and for a part of this time the accused was denied entry by the officer in charge. A conviction was reversed. *Cf.* Armstrong v. State, 179 Miss. 235, 174 So. 892 (1937). An accused may not successfully assert error where his absence is brief and voluntary and nothing appears to have been done at the scene until the presence of the accused is obtained.

[63]Bailey v. State, 147 Miss. 428, 112 So. 594 (1927).

C. Separation of Jury

In felony cases, the defendant is entitled to have the jury kept together without exception,[64] and in a capital case the jury cannot be dispersed even at the defendant's request.[65] Precautions should be taken to avoid such separation in the process of conducting a view of the premises. However, the jurors need not necessarily remain at all times in sight of one another, and in this connection it has been held that a jury is not separated in the technical sense where part remain in a room being inspected while part proceed onto an adjoining porch.[66]

D. Function of Witnesses and Scope of Testimony and Inspection at Scene

The statute provides that the places or objects to be inspected "shall be pointed out and explained to the court and jury by the witnesses in the case."[67] It has been held that this portion of the procedure is mandatory.[68] The witnesses then may be questioned by the court and by the parties, at the time and place of the view, in reference to any material fact brought out by such view.[69]

Generally, the extent and nature of the testimony at the scene is left to the court's discretion and the court may "confine the scope of the testimony to the purposes and spirit of the statute."[70] In a civil case illustrating the permissible scope of testimony at the scene, the court allowed a plaintiff, suing for injuries to his hand which occurred when the defendant's truck was passing through a gate near which plaintiff was standing, causing his fingers to be caught in the truck fender, to testify fully at the scene as to how the injury occurred and to point out the marks on the gate as made by the truck and the position of the truck, showing how near closed the gate was and where he was standing and to demonstrate these matters by acts as well as words.[71]

In an action for personal injuries due to a fall on stairs involving the question whether the stairs were properly lighted, "The jury . . . were

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[64]Grimsley v. State, 212 Miss. 229, 54 So. 2d 277 (1951); Clark v. State, 209 Miss. 586, 48 So. 2d 127 (1950).

[65]Grimsley v. State, *supra* note 64.

[66]Bailey v. State, *supra* note 63.

[67]Miss. Code Ann. § 1800 (1956).

[68]Poteete v. City of Water Valley, *supra* note 52.

[69]Miss. Code Ann. § 1800 (1956).

[70]Cotton Mill Prods. Co. v. Oliver, 153 Miss. 362. 379, 121 So. 111, 113 (1929). The trial court refused permission to have a demonstration conducted at the scene as to the proper method of oiling certain machinery. The action was affirmed on appeal.

[71]Bonelli v. Branciere, 127 Miss. 556, 90 So. 245 (1921). This case was cited with approval in S. H. Kress & Co. v. Sharp, 156 Miss. 693, 126 So. 650 (1930).

required to view it from every angle, to go up and down it, and their attention was specifically called *by counsel* to every physical feature that was involved . . . . In their presence the lights were turned out on the stairway, and again were turned on . . . ."[72] (Emphasis added.)

In an action for personal injuries in connection with the operation of a machine on an employer's premises, the order provided that no testimony would be taken at the scene but "The place and the machine were pointed out by some employee and one attorney for the defendant, but no questions were asked."[73]

On the other hand, a conviction in a criminal case has been reversed for error in allowing the testimony at the scene to go beyond eliciting information necessary to understand the location being examined, such as explanation of the scene, location of distances, positions and the like.[74] Inquiry cannot be made of the witnesses at the scene as to matters which are not necessarily connected with the scene.[75] An example is found in a case where a witness was erroneously allowed to testify as to a confession of guilt by the accused.[76]

E. Waiver of Error

In order for an aggrieved party to take advantage of errors committed at the scene in connection with the scope of the testimony allowed, there must be a timely objection.[77] An objection made after the court returns from the scene to the courthouse comes too late.[78] Also, an error in the admission of testimony beyond that allowed by the statute may be cured by a repetition of the testimony on the continuation of the trial at the courthouse.[79]

XII. Errors in Granting View and Waiver of Errors

To avail of error in the granting of a view over appropriate objection, the error, as in other cases, must be harmful.[80] Thus, where the

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[72]S. H. Kress & Co. v. Sharp, *supra* note 71, at 702, 126 So. at 652-53. No objections were raised as to the scope of the examination.

[73]National Box Co. v. Bradley, 171 Miss. 15, 24, 154 So. 724, 725 (1934). No objections were noted.

[74]Jones v. State, 141 Miss. 894, 107 So. 8 (1926).

[75]*Ibid.* The rule is especially strict in criminal cases because of the right of an accused to a public trial at the place designated by law for holding court.

[76]McPherson v. State, 124 Miss. 361, 86 So. 854 (1921).

[77]*Ibid.*

[78]*Ibid.* National Box Co. v. Bradley, 171 Miss. 15, 154 So. 724, *suggestion of error overruled,* 171 Miss. 16, 157 So. 91 (1934).

[79]McPherson v. State, *supra* note 76.

[80]Yorkshire Ins. Co. v. Brewer, 175 Miss. 538, 166 So. 361 (1936).

error assigned is that the court erroneously allowed a view, despite a change in the condition of the premises, such is not reversible if the view could not have had any bearing upon the issue finally submitted to the jury.[81] Again, where the view is allowed without a proper showing that such was essential to reach the ends of justice and the assignment of error on appeal is that the verdict is against the weight of the evidence, the error is not reversible if, on looking alone to the sworn testimony taken at the courthouse and leaving wholly aside the evidence taken at the scene and that which the jury may have there observed, it is manifest that the verdict is not against the weight of the evidence.[82] While it is error to request a view and force an objection in the presence of the jury, the error is not necessarily reversible. Thus, in a homicide case, it has been held that such error is harmless where the view allowed over objection is appropriate under the circumstances of the case and the great weight of the record evidence demonstrates the defendant's guilt.[83]

XIII. Effect on Appeal

In an early criminal case[84] the court had occasion to discuss the effect of a view, without oral evidence being adduced at the scene, as the equivalent of presenting evidence in the absence of the accused in violation of his constitutional guarantees. In this connection, the court said:

> Impressions are made on the minds of the jury by dumb witnesses. They do have evidence of inanimate things. They are receiving impressions, evidence, enlightenment, from voiceless things, call it by whatever name you will; and they are themselves being made silent witnesses for or against the accused. They return to the court room with impressions, opinions, formed by an examination of dumb, inanimate witnesses, and, if erroneous impressions and opinions have been made and formed, their hurt is beyond all cure, for the jurors may not speak out what may weigh on their minds, but are become themselves dumb, passive witnesses. To say the jury cannot receive evidence by simply viewing the scene, is to insult common sense. The most convincing evidence is made by the sense of sight. The juror on the view *sees*, and thinks he knows what he thus *sees*, with all the conclusions flowing therefrom. He sees, or may see, more than a mere railway car, or a naked room, or a piece of senseless earth. And no matter what he *sees*, and *falsely sees*, he cannot speak, and have his mistaken

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[81] *Ibid.*

[82] Great Atl. & Pac. Tea Co. v. Davis, 177 Miss. 562, 171 So. 550 (1937) (dictum); Armstrong v. State, 179 Miss. 235, 174 So. 892 (1937).

[83] Armstrong v. State, *supra* note 82.

[84] Foster v. State, 70 Miss. 755, 12 So. 822 (1893).

> conclusions corrected or removed. The impressions, the evidence made by the mute witnesses, may be more potent in fixing the jury's verdict than the living witnesses, speaking under oath to tell the truth.[85] (Emphasis added.)

From this it is apparent that the presumptive effect of a view is not to be minimized in considering its effect, when properly granted, on a review of the evidence on appeal or on consideration of the propriety of allowing the view when the statutory or judicial conditions have not been clearly met or where a question arises as to jurisdiction of the court to proceed at the particular place where the view is had.[86]

While the courts of the various jurisdictions differ widely on the ultimate effect to be given by the appellate court to the view by the jury, the Mississippi court is committed to a middle ground between the two extreme rules,[87] and has found the true solution in the conclusion that these cases stand upon a special footing. Under the special footing rule, the review of the case on the weight of the evidence is not upon the record alone, but there must nevertheless be found in the record a sufficiency of evidence to qualify as "substantial evidence" in support of the verdict, and that must be found apart from the unrecorded evidence furnished by the view.[88] Thus, where the evidence, apart from the view is uncontradicted, a directed verdict is appropriate.[89] But once this degree of evidence is found in the record, it is fortified by the fact of the view, and this may tip the scales in favor of the verdict where, on the basis of the written record alone, the verdict might have been set aside as being against the overwhelming weight of the evidence.[90]

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[85]*Id.* at 765-66, 12 So. at 823. This language was quoted by the court in Miller v. Ervin, 192 Miss. 712, 722-23, 6 So. 2d 910, 913 (1942).

[86]Miller v. Ervin, 192 Miss. 712, 6 So. 2d 910 (1942).

[87]*Cf.* S. H. Kress & Co. v. Sharp, *supra* note 71, at 702, 126 So. at 653: "Some courts hold that upon appeal the case must be considered solely upon the record of the testimony, while others maintain that the evidence which the jurors may reasonably be supposed to have obtained by the exercise of their powers of impartial observation while on the ground is to be considered as sufficient to sustain the verdict."

[88]Bonelli v. Branciere, *supra* note 71; Miller v. Ervin, *supra* note 86; S. H. Kress & Co. v. Sharp, *supra* note 71; Cotton Mill Prods. Co. v. Oliver, 153 Miss. 362, 121 So. 111 (1929).

[89]Miller v. Ervin, *supra* note 86.

[90]In several cases the court has indicated that the judgment would have been vacated as being against the weight of the evidence, except for the view by the jury. *Cf.* National Box Co. v. Bradley, *supra* note 78; S. H. Kress & Co. v. Sharp, *supra* note 71; Cotton Mill Prods. Co. v. Oliver, *supra* note 88.

BEGINNINGS OF THE LEGAL PROFESSION IN MISSISSIPPI

Sylvester John Hemleben and Richard T. Bennett***

In the pioneer days of Mississippi, lawyers came from many parts of the country seeking wealth and fame. Their lineage, origin, education, and professional experience varied.[1] Most lawyers, in the first three decades of the nineteenth century, had received their education in the New England, Atlantic coast, or mid-Southern states before coming to Mississippi. Some had engaged in the practice of law or other professional activities before moving westward. But most came with a rather limited knowledge of the law. The legal education of Mississippi lawyers was of the same quality, generally, as that of Abraham Lincoln.[2] The young man who aspired to become an attorney "read law" in a lawyer's office, and often after a short period of preparation "hung out his shingle." The average legal education of a hopeful practitioner has been aptly summarized:

> The more assiduous individual who determined to be a lawyer would read Kent's Commentaries on American Law and portions of Blackstone's Commentaries on the Laws of England and present himself first to the Supreme Court and then to the public. The Supreme Court ordinarily appointed one member of the bar as a committee to propound the oral questions. No doubt many began practice with far less training. Some merely attached themselves to a local lawyer and after a short period of observation, study and direction became a partner or opened a separate office. For such a formative and generally primitive era, advocacy was vastly more important than education although most of the lawyers were educated culturally if informally.[3]

The young attorney had generally equipped himself with the mini-

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[1]For a national perspective of the status of the legal profession in the United States during the early part of the nineteenth century, see: BLASSTEIN AND PORTER WITH DUNCAN, THE AMERICAN LAWYER: A SUMMARY OF THE SURVEY OF THE LEGAL PROFESSION (1954); HURST, THE GROWTH OF THE AMERICAN BAR (1950); POUND, THE FORMATIVE ERA OF AMERICAN LAW (1938); POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES (1953); REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW, Bulletins 15 and 21 (1928); DRINKER, LEGAL ETHICS (1953); 1 BIOGRAPHICAL AND HISTORICAL MEMOIRS OF MISSISSIPPI (1891).

[2]Farley, *The Education of Mississippi Lawyers*, REBEL 7 (August, 1946).

[3]*Ibid.*

mum qualifications for admittance to the bar of other states before entering Mississippi in search of a lucrative practice. The pioneer territory beckoned young men of the legal profession and they came to Mississippi in large numbers. This influx has been described as follows:

> When [the Choctaw and Chickasaw Indians had relinquished their land] an almost unprecedented tide of population flowed to Mississippi from other states, and from beyond the ocean; and the most remarkable influx of lawyers also took place, which has been never known in this country. These came chiefly from Tennessee, Kentucky, Virginia, Georgia, Alabama, Maryland, New York and New Jersey. Many of them were persons of much intelligence and worth, and of no little standing and influence in the states whence they had migrated . . . there [were also] a considerable number of those who were residents of the state at a much earlier period, and [were] well known in connection with the legal profession. . . .[4]

The reasons for migrating from the old, well-established communities of the United States into the pioneer civilization of early Mississippi were numerous and varied. One aspiring lawyer entered the area now embracing Mississippi because "Magnificent accounts came from that sunny land of most cheering and exhilarating prospects of fussing, quarrelling, murdering, violations of contracts, and the whole catalogue of *crimen falsi*—in fine, of a flush tide of litigation" both civil and criminal.[5] Other inducements which contributed to the growth of the legal profession may be seen in the litigation over land claims, as well as other conflicting interests in a new country. The appeal to ambitious lawyers from other areas has been seen as follows:

> The richness and reputation of its lands, and the conflicting tenures by which they were held, arising from British, Spanish, and Georgia claims; the effort of the early courts to reconcile the conflicting rules of the civil and common law in regard to alienation and descent; the establishment of banks of unlimited issue, and the consequent speculation and reactionary crises, produced a vast amount of litigation, that required and early attracted to the Mississippi Territory an unusual array of legal talent.[6]

It has been said that these were "the golden days of Mississippi."[7]

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[4]FOOTE, BENCH AND BAR OF THE SOUTH AND SOUTHWEST 45 (1876) [hereinafter cited as FOOTE].

[5]BALDWIN, THE FLUSH TIMES OF ALABAMA AND MISSISSIPPI 47 (1846).

[6]LYNCH, THE BENCH AND BAR OF MISSISSIPPI 20 (1881). Lynch fills a pre-eminent place in providing biographical sketches of the Mississippi bench and bar of the pioneer period, in many cases not obtainable elsewhere [hereinafter cited as LYNCH].

[7]DAVIS, RECOLLECTIONS OF MISSISSIPPI AND MISSISSIPPIANS 78 (1891). This work was written when Davis claimed to be "not only the oldest Mississippian now

The economic inducements of Mississippi have been portrayed as follows:

> This virgin country [Mississippi] invited immigration and capital from all parts of the older states. Millions of dollars were brought here for investment, and thousands of valuable citizens, merchants, planters, and professional men came to cast in their lot with those who were building up a great empire . . . . It was a time of fulness of life and activity, and possibilities seemed to await the hand that was adventurous enough to seize them. Cotton was the great staple. Credit was universal and where that system prevails, the lawyer always finds a rich harvest.[8]

Unquestionably, an additional factor which encouraged young men to enter the field of law was that the requirements of admission to the bar were not as demanding in that age in the United States as today. The first Territorial Code of Mississippi provided that:

> No person shall be admitted to practice as an attorney, in any of the courts of this Territory, until he shall have produced full and sufficient testimonials, to the Governor; that he is a good moral character, and well affected to the Government of the United States, and of this Territory; that he has had opportunity to qualify himself for the said office, and by examination before one or more of the Territorial judges, shall be found to have made such proficiency, as will render him useful therein. . . .[9]

In 1828, in an attempt to improve the standards for admission to the bar, an amendment was passed which required an applicant who desired a license to practice law in Mississippi to produce satisfactory evidence that he had regularly studied his profession for a term of two years in the office or under the direction of some respectable lawyer or judge, that he had attained the age of twenty-one years, and was a man of good moral character, who had resided within the territorial boundaries of the state six months preceding his application.[10] Doubt-

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in the profession, but the sole survivor of the bar of fifty years ago." Davis (1813-1890) was a political leader, soldier, district attorney, justice of the Supreme Court of Mississippi, and considered by many to have been unequalled as a criminal lawyer in his prime. For a biographical sketch of his life, see Rowland, 1 ENCYCLOPEDIA OF MISSISSIPPI HISTORY 632-36 (1907).

[8] *Id.* at 78.

[9] SARGENT'S CODE: A COLLECTION OF THE ORIGINAL LAWS OF THE MISSISSIPPI TERRITORY ENACTED 1799-1800 BY GOVERNOR WINTHROP SARGENT AND THE TERRITORIAL JUDGES 110 (1939).

[10] LAWS OF THE STATE OF MISSISSIPPI 153-54 (1828). One celebrated and distinguished member of the early Mississippi bar was Seargent S. Prentiss who, in 1829, wrote his sister prior to his bar examination that, "I have been studying pretty hard of late, preparing for the examination. Candidates for admission are examined at the Supreme Court, which sits next week . . . I shall go out on horseback

lessly, the lenient preparatory standards for entering the profession were augmented by the social and political conditions surrounding the Jeffersonian era which considered professions, and particularly bar associations, undemocratic and un-American.[11] As time passed, however, the bench and bar continued to exert a creative influence on the state despite these somewhat low professional entrance qualifications.[12]

Thus it was that as a result of many inducements, attorneys came in great numbers almost by every stage coach which came into Mississippi, and by every steamer which descended the Mississippi River. Many came only with an intention of staying for a short period, leaving their families behind them, while others came to take up a permanent residence.[13]

During this period, conditions of travel complicated the orderly processes of judicial development.[14] In a country of long distances and slow and expensive travel, the common law system of central courts imposed an intolerable burden upon litigants.[15] It placed a heavy burden on lawyers as well. To get to court, lawyers had to travel by foot, boat, stage coach, or horseback. In 1823, one lawyer rode a distance of 150 miles within one judicial district[16] in order "to bring the administration of justice to every man's door."[17] The number of law books written and published during this time were comparatively few.[18] Consequently, the lawyers in active practice used but few books, but in these they were well grounded.[19] On their travels, lawyers probably carried the works of Blackstone and a copy of the laws of Mississippi. It is also probable that they had some additional reference books which pertained to such subjects as real and personal property, pleadings, evidence, contracts, criminal law, and negotiable instruments. Most trials attracted to the local court house a vast assemblage of excited citizens.[20] They had an intense community interest in the workings of the judiciary.[21] This was the age when good oratory was highly appreciated. The art of public speaking

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. . . [to the location of the Supreme Court and hope] by the time you read this letter I shall have a lawful right to the title of 'Esquire.'" PRENTISS, 1 A MEMOIR OF S. S. PRENTISS 98-99 (1881).

[11]DRINKER, LEGAL ETHICS 19 (1953); Pound, *The Legal Profession in America*, 19 NOTRE DAME LAW. 341 (1944).

[12]LYNCH 215.

[13]FOOTE 55.

[14]POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 183 (1953).

[15]POUND, THE FORMATIVE ERA OF AMERICAN LAW 7-8 (1938).

[16]CLAIBORNE, LIFE AND CORRESPONDENCE OF JOHN A. QUITMAN 86 (1860).

[17]Pound, 19 NOTRE DAME LAW. 342 (1944).

[18]Kimbrough, Mississippian, April 6, 1923, p. 16.

[19]*Ibid.*

[20]FOOTE 36. For an account of some early trials, see DAVIS, RECOLLECTIONS OF MISSISSIPPI AND MISSISSIPPIANS 33-42 (1891).

[21]*Id.* at 69.

was cultivated, and a lawyer could hope for little success in his profession unless he possessed this talent.[22] Whenever the supreme court of the state was in session, many attorneys from remote counties were also in attendance,[23] and most of the inns were crowded with litigants and observers.[24]

The common law of England dominated this early period, since judicial proceedings were required to be conducted according to the course of the common law.[25] The practice of law was not, of course, as complex as it is today. Most court sessions were apparently conducted expeditiously and fairly. Court dockets were always crowded with suits, and were seldom cleared.[26] This mass of litigation, civil and criminal, served to bring out and develop the legal talent of the profession.[27] Some itinerant lawyers developed a flourishing and lucrative law practice.[28] Moreover, almost all of the early advocates were dedicated, sagacious, and responsible men who kept the interests of their clients uppermost in mind.

Lawyers constituted a strong political power, and they actively participated in the affairs of state. Many filled legislative positions and participated in state administration. Others campaigned and helped to mold the political destiny of the state. Many served the judiciary of the state as judges and as district attorneys.[29] One source gave the following glowing and uncritical description of the ante-bellum Mississippi lawyer:

> It would be but doing simple justice to the bench and bar of Mississippi during the period which elapsed from 1830 to 1860, to assert that no state of the Union could then boast of an abler and more incorruptible judiciary, or a greater number of lawyers and advocates of deep legal learning, of brilliant and effective eloquence and of pure and unimpeachable morals. . . . In the exercise of their noble calling, the members of the bar were almost uniformly upright, frank, manly; vigilant and ener-

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[22] *Ibid.*

[23] FOOTE 18.

[24] CREECY, SCENES IN THE SOUTH 60 (1860).

[25] See further Howry, Rise and Progress of the University of Mississippi School of Governmental License and Law 16 (unpublished manuscript, on file in the School of Law Library, University of Mississippi).

[26] FULKERSON, EARLY DAYS IN MISSISSIPPI 100-01 (1937).

[27] *Id.* at 100.

[28] DICKEY, SEARGENT S. PRENTISS: WHIG ORATOR OF THE OLD SOUTH 41-42, 355-56 (1945). In 1828, Prentiss had commented that the opportunities in the legal profession were greater in Mississippi than in his native state of Maine. "Law here, is a good theory to live by—if a man can keep from dying. Probably the average annual income of lawyers is $2,000 to $2,500—although I know some who make four, five, and six thousand—Did I wish to make a fortune I would certainly settle myself here."

[29] See generally ROWLAND, COURTS, JUDGES AND LAWYERS OF MISSISSIPPI 1-45 (1935).

> getic, but courteous and accommodating; disdaining to succeed in any case by mere trick or chicane; and sacredly observant of all the engagements they assumed, or agreements into which they entered with opposing attorneys, whether these were oral or reduced to writing.[30]

There is much in the early history of Mississippi which reflects the contributions of the legal profession. The list of Mississippi attorneys who performed civic and political responsibilities is long and illustrious. Lawyers stimulated and enriched the growth of law and order which, in turn, materially affected the over-all development of the state. The leaders of the legal profession formulated, in the face of many difficulties, a general body of law and handed down a great tradition.

In regard to illustrious lives of eminent lawyers in Mississippi prior to the 1830's, little can be ascertained for "the corroding finger of time has dimmed the records of their greatness."[31] Among the outstanding leaders of whom a comprehensive knowledge is regrettably lacking, was Harry Toulmin who was born at Taunton, Somersetshire, England, in 1766.[32] Although he did attend an academy, most of his education was obtained from reading in his mother's bookstore. He wrote three pamphlets encouraging immigration to America.[33] Jefferson and Madison gave him letters of introduction, and with these as an *open sesame* he went to Kentucky where he secured the presidency of Transylvania University. He was the author of several works on law.[34] In 1804 he was appointed by President Jefferson as a judge of the Superior Court for the Eastern District of the Mississippi Territory, in which position he did much to untangle land claims in the region.[35] At the request of the legislature, he undertook to compile a digest of the laws of the Territory.[36] This was adopted in 1807 by the general assembly as the law of the Territory.[37]

Many of the political leaders of pioneer Mississippi were drawn from the legal profession. Such a man was Christopher Rankin, a native of Pennsylvania, who had gone to Georgia where he taught school and

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[30] FOOTE 59-60.

[31] LYNCH 20.

[32] 18 DICTIONARY OF AMERICAN BIOGRAPHY [hereinafter cited as D.A.B.], *Toulmin, Harry*, 601 (1936). Lynch records that he does not know "of what State Judge Toulmin was a native." LYNCH 21.

[33] 18 D.A.B. 601.

[34] 18 *Ibid.*

[35] 18 D.A.B. 601-02.

[36] THE STATUTES OF THE MISSISSIPPI TERRITORY (1807). It is now a work of a rare book classification; a copy is on file in the Library of the Law School, University of Mississippi. In addition to A COLLECTION OF THE PERMANENT AND PUBLIC ACTS OF THE GENERAL ASSEMBLY OF KENTUCKY which he had compiled earlier in 1802, he produced in 1823, A DIGEST OF THE TERRITORIAL LAWS OF ALABAMA. 18 D.A.B. 602.

[37] LYNCH 21-22.

prepared for the bar. It was in 1809 that he came to Mississippi where he became a member of the legislature and a member of the convention that adopted the first constitution of Mississippi. He was elected to the National House of Representatives.[38] Another lawyer who rose high in politics was Thomas D. Reed who came from Kentucky. A man of little formal education, he, nevertheless, became Attorney General of the State in 1821 and United States Senator in 1827.[39] Robert H. Adams, too, had received but little education in his youth, but he also was able to overcome his early obstacles, and he became a member of the legal profession. A native of Virginia, Adams went to Tennessee for a short period, after which he moved to Natchez where he soon became recognized as one of the most eminent members of its bar. He was elected in 1830 to the United States Senate.[40]

Lyman Harding, a native of Massachusetts, had received a good education. He went to Maryland where, while teaching school, he prepared for a legal career. After being admitted to practice, he went on foot to Pittsburg, then by flatboat on the Ohio River to Louisville, where he began the practice of law. His practice did not prosper, and he was compelled to work his passage as a laborer on a flatboat to Natchez, "the Athens of Mississippi intelligence" as it was then called.[41] Here he developed one of the most lucrative practices in the Territory. He became Attorney General, for which he received a salary of $1,000 plus $7.00 per day when he attended the legislature.[42]

One of the most prominent names in the early legal history of Mississippi was George Poindexter, a native of Virginia. He seems to have had a sporadic education.[43] After studying law under the supervision of a lawyer, he began, in 1799, to practice in Milton, Virginia.[44] His departure was beclouded by the charge that he left to defraud his creditors.[45] Poindexter settled in Natchez in 1802[46] and was elected as a member of the assembly of the Territory soon afterwards. In 1807 he was selected as a delegate from the Territory to the National Congress.[47] He received a presidential appointment as one of the judges of the Superior Court of the Territory in 1813.[48] Four years later he was the leading member of the Convention to organize a State government, and

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[38] *Id.* at 22-23. The County of Rankin was named after him.

[39] *Id.* at 23-24.

[40] *Id.* at 24-26.

[41] *Id.* at 26, 138.

[42] *Id.* at 26-27.

[43] 15 D.A.B., *Poindexter, George,* 29. Lynch was under the impression that he had the advantages of a good education. LYNCH 27.

[44] SWEARINGEN, THE EARLY LIFE OF GEORGE POINDEXTER 22 (1934).

[45] *Ibid.*

[46] 15 D.A.B. 29.

[47] *Ibid.*

[48] *Ibid.*

because of his exemplary leadership he perhaps may be considered the father of the first constitution.[49] When Mississippi became a state in 1817, Poindexter became a member of the National House of Representatives. In 1819 he delivered a famous and eloquent speech on the Seminole War[50] in which he praised for nearly three hours the conduct of General Andrew Jackson. In 1819 he was elected Governor of Mississippi and served from 1820 to 1821. The legislature authorized him, while he was still Governor, to begin work on a revision of the statutes of the State. His code was completed in 1822.[51] It became the law of the State in 1824 and was generally known as "Poindexter's Code."[52] This was the first real code in Mississippi.[53] In 1830 he was elected by the legislature to the Senate of the United States; he retired from the Senate in 1836.[54]

A profound lawyer and great orator, Poindexter was chosen in the early part of his career to prosecute Aaron Burr who was arrested in Natchez and given a judicial examination in the town of Washington, at that time the seat of the government of the Territory. Burr was acquitted, in spite of the energetic efforts of Poindexter.[55]

As Governor he showed himself the staunch friend of public education. In his message to the legislature in 1820, he said, "The avenues to education and knowledge ought to be made accessible to every youth, without distinction to rank."[56] His influence upon the system of jurisprudence in Mississippi was considerable. In his message as Governor in 1821 he decried the evils which resulted, in his opinion, from a combination of common law and chancery courts. The legislature, in that session, separated the chancery jurisdiction in Mississippi.[57] Poindexter, perhaps, quite fully deserves the sobriquet given him of being "one of the ablest men of Mississippi" in his day.[58]

Joseph Emory Davis, brother of Jefferson Davis, was born in Georgia. The family moved to Kentucky when Joseph was about twelve years old. He received what education was available in the county schools, served as a merchant's clerk, and then began to study law in the office of a judge.[59] The family moved to Mississippi in 1811 and he continued to read law in an attorney's office. He was admitted to the bar

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[49]LYNCH 29-30. He based the new Constitution of Mississippi on the philosophy of the Virginia School of Democracy. 15 D.A.B. 30.

[50]Annals of Congress, 15 Cong., 2 Sess., cols. 936-85 (1855).

[51]LYNCH 30.

[52]The official title is REVISED CODE OF THE LAWS OF MISSISSIPPI (1824).

[53]15 D.A.B. 30.

[54]LYNCH 30-32.

[55]*Id.* at 33.

[56]*Ibid.*

[57]*Id.* at 34.

[58]15 D.A.B. 30.

[59]LYNCH 73.

in 1812.[60] Davis was a delegate in 1817 to the convention for the organization of a state government. In 1820 he moved to Natchez and formed a partnership with Thomas D. Reed who was recognized as a leader of the bar of the state. Highly successful in the practice of law, he retired in 1827 to the life of a planter.[61] On his plantation, no slave was punished for a crime, unless sentenced by a jury of his peers; the master himself presided over the trial. His plantation jury was to find a verdict not from the evidence presented but from their opinion of the character of the defendant.[62]

The first Chief Justice of the new State, John P. Hampton, was, it is believed, a native of South Carolina. He had early carved out a distinguished legal career in Mississippi.[63] In 1829 he was succeeded on the supreme court by Edward Turner.

Turner was born in 1778 in Virginia. He was the grandson of William Payne who supposedly knocked down George Washington, according to the unrealistic and unreliable account of "Parson Weems."[64] In 1786 the family moved to Kentucky. After a common school education, he attended Transylvania University at such times as his means permitted.[65] He began the study of law in the office of George Nicholas.[66] In 1802 he emigrated to Natchez where he began the practice of law.[67] He became clerk to the house of representatives of the Territory, as well as private secretary to the Governor.[68] In 1803 he received a federal appointment as Register of the newly established land office at Washington, Mississippi.[69] In 1811 he was in the legislature. In 1815 Turner was appointed by the legislature to prepare a digest of the statutes of the Territory, which work he completed in 1816.[70] The digest[71] was adopted and published in the same year.[72] Turner was a member of the Convention of 1817 and was elected to the first state legislature in 1818

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[60] *Ibid.*

[61] *Id.* at 73-75.

[62] *Id.* at 75-76.

[63] *Id.* at 81-83.

[64] In 1754 when George Washington was 22 years old, he was stationed at Alexandria and became embroiled in a political dispute with Payne who, according to Weems, "though but a cub in size, was the old lion in heart, raised his sturdy hickory, and, at a single blow, brought our hero to the ground." WEEMS, THE LIFE OF GEORGE WASHINGTON 205 (1840). The next day Washington apologized. WEEMS 206.

[65] LYNCH 84.

[66] 19 D.A.B. *Turner, Edward,* 60.

[67] LYNCH 84.

[68] 19 D.A.B. 60.

[69] *Ibid.*

[70] LYNCH 85.

[71] STATUTES OF THE MISSISSIPPI TERRITORY (1816). A copy is in the rare book collection of the Law School Library, University of Mississippi.

[72] LYNCH 85.

where he was Speaker of the House of Representatives in 1819 and 1820.[73] He became Attorney General in 1820, judge of the criminal court of Adams County, a judge of the supreme court of the State in 1824, and in 1829 its Chief Justice.[74] He remained on the supreme bench until the adoption of the Constitution of 1832, which provided for popular election of judges.[75] In 1834 he was elected Chancellor of the State and served until 1839. In this position he improved chancery jurisprudence.[76] He returned to the supreme bench in 1840 and in 1843 went to the state senate.[77]

Powhatan Ellis, born in Virginia in 1790, was named for the father of Pocahontas, from whom he claimed to be descended.[78] He studied for three years at Washington College, now Washington and Lee, and graduated from Dickinson College in 1810. He graduated in law at William and Mary.[79] Ellis came to Mississippi where he established himself as a lawyer of repute, and in 1818 he became one of the first judges of the supreme court of the State.[80] In 1825 he was appointed by the Governor to fill a vacant seat in the United States Senate. This was later followed by his election to the Senate.[81] His office terminated in 1832 when he was appointed judge of the Federal District Court by President Jackson. Later, he became United States charge' d'affaires to Mexico.[82] A bachelor with unorthodox judicial views of the relations of husband and wife, he handed down a decision in the case of *Bradley v. State*[83] that a husband was privileged to chastise his wife if he did not use a whip or rattan larger than the thumb.[84]

> However abhorrent to the feelings of every member of the bench, must be the exercise of this remnant of federal authority, to inflict pain and suffering, when all the finer feelings of the heart should be warmed into devotion, by our most affectionate regards, yet every principle of public policy and expediency in reference to the domestic relations, would seem to require, the establishment of the rule we have laid down, in order to prevent the deplorable spectacle of the exhibition of similar cases in our courts of justice—Family brawls and dissentions cannot be investigated before the tribunals of the country, without casting a shade over the character of those who are unfortunately en-

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[73] *Ibid.*
[74] 19 D.A.B. 60.
[75] *Ibid.*
[76] LYNCH 85.
[77] 19 D.A.B. 60.
[78] 6 D.A.B. *Ellis, Powhatan,* 108.
[79] 6 D.A.B. 108.
[80] *Ibid.*
[81] LYNCH 87.
[82] 6 D.A.B. 108. Ellisville, Mississippi, is named in his honor. *Ibid.*
[83] 1 Miss. (Walker) 156 (1824).
[84] *Id.* at 156, 157.

> gaged in the controversy. To screen from public reproach those who may be thus unhappily situated, let the husband be permitted to exercise the right of moderate chastisement, in cases of great emergency, and use salutory restraints in every case of misbehaviour, without being subjected to vexatious prosecutions, resulting in the mutual discredit and shame of all parties concerned.[85]

Another of the first judges on the State supreme bench was John Taylor who had originally come from Pennsylvania. He served from 1818 to 1822.[86] He had been a member of the assembly of the Territory and a member of the Convention of 1817.[87] It was said of him that being a bachelor, "his law books were the chief objects of his solace and companionship."[88] Another of the first judges of the supreme court was Joshua G. Clarke, a native of Pennsylvania. In many respects his career closely paralleled that of Taylor. Clarke, too, was in the territorial assembly and sat in the Convention of 1817. He was advanced to the supreme court in 1820. Clarke has the distinction of being the first Chancellor of the State.[89] Another early statesman was John Black, who came from Massachusetts, was appointed to the supreme court of the State in 1826, and held this office until 1832.[90] He became a United States Senator. In 1835 the House of Representatives of Mississippi passed a resolution calling for his resignation because of his opposition to some of the measures of President Jackson.[91] Black did not see fit to comply.

Another early justice of the supreme court was Princeton-educated Richard Stockton. He came to the supreme bench in 1822, only to resign in 1825 under unusual circumstances. The legislature in 1834 passed "an act further to extend relief to debtors" providing that property, taken in execution, which should not when offered for sale bring two-thirds of its appraised value, should be sold by the sheriff on terms of one year's credit.[92] When a sheriff proceeded in conformity with the act, the cause came before the supreme court which levied a fine of one hundred dollars against the sheriff for making an undue and false return.[93] The house of representatives in 1825 passed a resolution calling upon the judges of the court to appear at the bar of the house and show cause why they should not be removed from office.[94] Judge

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[85] *Id.* at 158.
[86] LYNCH 89.
[87] *Id.* at 88-89.
[88] *Id.* at 89.
[89] *Id.* at 89-90.
[90] *Id.* at 90.
[91] *Id.* at 90-91.
[92] LAWS OF THE STATE OF MISSISSIPPI 49-55 (1838). See § 7.
[93] LYNCH 93.
[94] *Ibid.*

Stockton appeared, and submitted the position taken by the court. The committee of the house propounded certain questions to Judge Stockton. The committee was dissatisfied and stated that they believed the decision of the court on the unconstitutionality of the act was erroneous and without authority in suspending the operation of any law, that the fine upon the sheriff was illegal, that no officer should be punished for executing process when it emanated from proper authority, that it was the officer's duty to execute it and not judge its legality.[95] Under these circumstances, Judge Stockton tendered his resignation. Later, he went to New Orleans where he died in a duel.[96]

There were other outstanding members of the bench in early Mississippi, such as Joshua Child whose inclination to drink and whose anger with members of the bar while "under the influence" were well known.[97] George Winchester, a graduate of Harvard College, became a judge of the supreme court in 1826. After he had retired from the bench, he appeared before it in an important case. The court decided in his favor but on grounds other than those he had offered. He refused to accept the decision unless it was founded on the views which he considered proper.[98] Henry Cage was perhaps better known for his congeniality and vivaciousness than for judicial temperament.[99]

Robert J. Walker was called "one of the brightest intellects that adorn [sic] the history of the bar of Mississippi."[100] He was born in Pennsylvania in 1801 and graduated with first honors from the University of Pennsylvania in 1819.[101] He was a linguist, being particularly proficient in French.[102] He was admitted to the bar in Pennsylvania in 1821.[103] He moved to Natchez in 1826 where he entered the practice of law with his brother who had preceded him there.[104] He is to be remembered for his preservation of the first Mississippi Reports[105] which covered the decisions of the court from its establishment to 1832.[106] He served in the United States Senate where he was known for his arguments on the "Mississippi slavery questions."[107] He was ap-

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[95]*Id.* at 93-96.

[96]*Id.* at 97.

[97]*Id.* at 99-100.

[98]*Id.* at 100-01.

[99]*Id.* at 102-03. Among other jurists of note may be mentioned Isaac R. Nicholson and Alexander Montgomery. *Id.* at 103-08.

[100]*Id.* at 109.

[101]19 D.A.B. *Walker, Robert John,* 355.

[102]LYNCH 110.

[103]19 D.A.B. 355.

[104]*Ibid.*

[105]Reports of Cases Adjudged in the Supreme Court of Mississippi (1834).

[106]Preface, Reports of Cases Adjudged in the Supreme Court of Mississippi (1834).

[107]LYNCH 110. He was closely identified with the anti-bank and repudiating

pointed Secretary of the Treasury by President Polk, and in 1857 he was appointed Governor of Kansas Territory by President Buchanan, but resigned in 1858.[108]

William B. Griffith studied law in his home state of Maryland before removing to Mississippi, where, it is said, he became "its most polished orator."[109] The ornate oratorical style of a gone-by day may be seen in his Fourth of July oration, 1819:

> Be present, then, spirits of our departed heroes! descend from your exalted sphere, to aid and inspire us this day, while we offer up, on the altar which national gratitude has erected, the humble but sincere effusions of republican congratulations! We approach you, not with the fragrant incense of the East or the pompous glories of the Hecatobm: we offer up what we conceive to have been the object of your labors upon earth; perhaps we may say, without the imputation of impiety, an addition to the joys of heaven—the grateful homage of a nation of freemen . . . .
>
> It is with a view to add my sincere and ardent wish that the return of this day, through ages yet to come, may find our country in the enjoyment of the blessings of liberty and independence; her shores unpolluted with the footsteps of an invading foe; her inhabitants uncorrupted by luxury, undivided by faction; her dominions the habitations of plenty and the residence of peace. While the nations of Europe are contending for an extension of their boundaries, and bathing their plains in blood to saturate the rapairty and gratify the ambitions of their monarchs, grant, O God! that our country may ever be the restingplace for the weary dove of the Angel of Peace![110]

William Vannuson came from Virginia and settled in Mississippi about 1825 where he developed a large practice. He was several times elected to the legislature and in 1837 was Speaker of the House.[111] He was also a circuit judge for several years. He has been considered one of the most successful criminal lawyers in the state of his day.[112] His great strength lay in his appeals to a jury where he "often caused tears of sympathy to trickle down the cheeks of the most hard-visaged juror."[113] He took pleasure in the appellation, "the Napoleon of the

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party in his state. 19 D.A.B. 355. He was an advocate of the acquisition of Texas. LYNCH 110-11.

[108]He resigned over the adoption of the Lecompton Constitution and its approval by the administration. 19 D.A.B. 357. During the Civil War, Walker declared in favor of the Union and represented the Federal Government as its financial agent in Europe. *Ibid.*

[109]LYNCH 113.

[110]*Id.* at 110, 126.

[111]*Id.* at 127.

[112]*Ibid.*

[113]*Ibid.*

bar."[114] He claimed to be one hundred years old at the time of his death.

In the roll of successful lawyers in early Mississippi there should also appear the names of Spence M. Grayson,[115] and Alexander G. McNutt, both of whom rose from poverty. McNutt was elected Governor.[116] William Leake, a native of Virginia, was one of Mississippi's first Senators in Congress. He was a circuit court judge and in 1822 was elected Governor of the State.[117] In his message to the legislature in 1825 he deplored permitting young district attorneys in the grand jury rooms, "where from ignorance or design they might and no doubt often did, mislead the juries as to the law."[118] He was an ardent advocate of education. In one of his messages, Governor Leake warned: "Without knowledge, republican virtue must dwindle to a shadow, and the people, in ignorance of their rights and privileges, will easily be made instruments by artful and designing men for the destruction of their liberties."[119]

Edward C. Wilkinson, a man of good education, came from Virginia to Natchez. He finally located in Yazoo City where he became a circuit judge of that district.[120] On the eve of his marriage to a beautiful and accomplished young lady in Louisville, with all the wedding preparations complete, he became embroiled in an affray in a hotel in which he killed his adversary. The judge had accompanied his brother to a tailor to get the suit his brother ordered. There were hot words over the fit of the suit not being right. The tailor with his friends followed the judge and his brother to their hotel. In the trial for murder, Wilkinson was acquitted, on the ground of self-defense.[121]

Other able lawyers in early Mississippi deserving of mention are: Eugene Magee,[122] Buckner C. Harris,[123] John T. McMurran,[124] Samuel S. Boyd,[125] Samuel P. Marsh,[126] and John Henderson.[127] There was also Richard H. Webber, a man of rough manners and little education, but a popular lawyer and a fine logician.[128] He engaged strenuously in the

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[114] *Id.* at 128.
[115] *Id.* at 132.
[116] *Id.* at 133.
[117] *Id.* at 135.
[118] *Id.* at 136.
[119] *Id.* at 136-37.
[120] *Id.* at 138.
[121] *Id.* at 138-39.
[122] *Id.* at 137.
[123] *Id.* at 139-40.
[124] *Id.* at 140-42.
[125] *Id.* at 142-43.
[126] *Id.* at 144.
[127] 8 D.A.B. *Henderson, John,* 527.
[128] LYNCH 146.

pursuit of revelry. Webber, in one instance, was in court deep in his cups and when the case was called the opposing lawyer, who had apparently taken even mightier drafts, asked for a continuance because of his indisposition. Webber told the court that he respected the infirmity of his brother lawyer because he was suffering from the same malady, but he asked that the case go on as there was no telling when either would be in improved health. Webber, it might be added, won over his more debauched opponent.[129]

The lawyers of the pioneer era contributed much to the development of law and justice in Mississippi. They laid the foundations of the legal structure of the state and, it may be said, that they laid it well. The educational backgrounds of the young lawyers who came to Mississippi may be assumed to have been no better and no worse than what existed in other parts of the country. The abilities of the pioneer advocates in Mississippi were, no doubt, also comparable to that of lawyers who made their way into other parts of the West of the day. Mississippi Territory attracted many young attorneys because of its economic inducements. To some it must have seemed a lawyer's paradise. "Did I wish to make a fortune," said one young man, "I should certainly settle myself here."[130] What is truly significant is that with little legal training and often inadequate general education, so many attorneys of the day rose to the occasion, served their clients well and met the needs of their day. It must have been for many the overcoming of great educational handicaps. When one reads the decisions given by the supreme court of the State and observes the legal learning and the rhetoric in which the opinions are written, one is impressed with the abilities of the early judges. Pioneer lawyers, without the educational advantages of a later age, served their state and nation, and served well.

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[129]*Id.* at 147.

[130]See note 28 *supra.*

INTERNATIONAL LAW: THE UTILITY OF ITS STUDY AS PREPARATION FOR LAW PRACTICE

Address to the International Law Society of the University of Mississippi School of Law

*Brunson MacChesney**

A Spanish seaman, hired in Spain by the Spanish Line, a Spanish corporation, was severely injured in Hoboken harbor in the course of his work on deck as a member of the crew on one of the Spanish Line's vessels temporarily docked there. He sued his employer in the district court under the Jones Act for negligence, and his employer and others involved for damages arising from asserted unseaworthiness of the vessel. The Supreme Court held, *inter alia*, that for reasons of reciprocity and comity in international shipping, our statute and laws could afford no relief on these facts in our courts against his employer.[1] Two Justices dissented.

American seamen's unions attempted, under the Taft-Hartley Act, to organize the foreign crews of foreign flag vessels belonging to the so-called "flags-of-convenience" fleet. The National Labor Relations Board ordered an election. On appeal, the Supreme Court held unanimously that the act did not apply to such a situation, again largely on international reciprocity and comity grounds.[2]

Two Yugoslavian nationals died intestate in Oregon. Under Oregon law, their personal property would normally descend to their nearest relatives in Yugoslavia. The Oregon court, however, construing an Oregon statute requiring reciprocity in effective receipt of inheritance rights held that, since United States citizens could not be sure of such receipt, due to Yugoslavian exchange controls, in the converse situation, the property escheated to Oregon under the statute. The Oregon court also held that a commercial treaty with Serbia, still in force with Yugoslavia as the successor state, applied only to legatees in the United States. The United States Supreme Court reversed, holding that the treaty covered legatees in Yugoslavia and that the treaty overrode the Oregon

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[1]Romero v. International Terminal Operating Co., 358 U.S. 354 (1959).

[2]McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963).

law under the Supremacy Clause of the Constitution.[3] It also held, as an additional ground, that Yugoslavian exchange controls were consistent with the Bretton Woods Agreements, multilateral treaties to which both countries were parties, and therefore Oregon was not free, apart from the commercial treaty, to ignore the Bretton Woods Agreements in construing its own statute. In another case, the Supreme Court affirmed a New York Surrogate's refusal, based on New York law, to permit a bequest to legatees resident behind the Iron Curtain.[4] Two Justices dissented on the ground that state "iron curtain" statutes were possibly invalid as an interference with national supremacy in foreign affairs.

Only last term, the Supreme Court held in the *Sabbatino* case[5] that the Act of State Doctrine prevented examination by any American court of the legality under international law of the seizure by the Castro regime without any real compensation of sugar located in Cuba and owned by a Cuban corporation almost wholly owned by United States citizens. Justice White dissented vigorously. Congress acted quickly to reverse the decision temporarily pending further congressional study.[6]

These examples of relatively recent Supreme Court decisions in the fields of admiralty, labor relations, inheritance, and nationalization are illustrative of the impact of international law considerations on vital matters affecting our daily lives. They suggest that the present-day American lawyer would be well-advised to familiarize himself with the subject as part of his professional equipment as well as in his role as a leader in public affairs.

Although international law was part of the stock in trade of those founding fathers of our country, who were lawyers, it seemed to get lost in the expanding growth of the continent in the nineteenth century. It did not get lost literally, but the average common law lawyer tended to consider it as a somewhat esoteric specialty not related to his daily concerns. Some lawyers, of course, continued to practice it, particularly those on seacoasts and with clients involved in international trade. Even after our overseas expansion at the turn of the century and, even more surprisingly, after our involvement in World War I, this tendency continued to prevail.

It was only after World War II that more general interest in the field was engendered in the law schools and at the American Bar. Prior to World War II, international law, when taught at all, was largely taught in political science departments, and only a few law schools offered instruction in the subject. Since World War II, the situation has

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[3]Kolovrat v. Oregon, 366 U.S. 187 (1961).

[4]Ioannou v. New York, 371 U.S. 30 (1962) (Douglas, J., with whom Black, J., concurs, dissenting).

[5]Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

[6]Text at III International Legal Materials 1075 (Nov., 1964).

been completely reversed. Many law schools embarked on ambitious programs of international legal studies, comprising not only international law proper, but all phases of law having foreign aspects. Thus, courses in comparative law and international business transactions burgeoned at the larger law schools. Concurrently, political science interest in international law waned as attention was increasingly devoted to international politics rather than law.

A recent survey conducted by The American Society of International Law of the teaching of international law and related subjects in American law schools gives dramatic evidence of the expansion of the subject in the law school world since World War II. More and more law schools are at least giving one course in the area. Many more schools are giving two or more courses, and some of the larger schools are giving as many as ten to fifteen courses and seminars in the area. In this latter class of schools are not only such schools as Harvard and Michigan but also Virginia and Southern Methodist.

Although the Section of International and Comparative Law of the American Bar Association was founded in 1934 by the late Dean Wigmore, its greatest growth and activity has been in the years after World War II. Moreover, not only the section but the American Bar Association as a whole has devoted increasing attention to the many ramifications of the subject. Former President Charles Rhyne has stimulated the interest of many lawyers in the World Peace Through Law movement. Not only is the movement both world-wide as well as national, but committees have also been formed in many state and local bar associations.

On another front, the American Bar Association, jointly with the American Law Institute, has sponsored numerous well-attended meetings throughout the country devoted to the legal aspects of international business transactions. The interest that has been displayed in these meetings reflects the awareness of many American lawyers that knowledge about these matters is now becoming indispensable in practice.

The American Law Institute has not only engaged in this collaborative project, but has completed during this period the drafting of a Restatement of the Foreign Relations Law of the United States. Both the title and the choice of subjects covered are significant. The title reflects the fact that international law is not divorced from the main body of our law, but is inextricably commingled with it. Thus, the agreement-making power of the United States has inevitably both international and internal constitutional law aspects. The significance of the topics chosen for restatement will be developed subsequently.

Nor has the increased interest of the American lawyer been reflected only in organizational efforts. The impact on private individual and firm activities has been notable, without reliance on the expanded

need of national and international government agencies for the international lawyers. Dean Wigmore, in his *1941 Syllabus of American International Law for American Practitioners*, wrote: "The object of this Syllabus is simply to demonstrate to the practitioners of the United States that virtually *every* principle of International Law has had applications in our United States practice, and is still *potential of a fee to be earned by a practitioner.*" If a reader would have been skeptical then, he should not be now. In Chicago, for example, since World War II, many law firms for the first time have opened offices abroad. One firm has more than ten such offices. The International Law Committee of the Chicago Bar Association has expanded from a handful of people immediately after the war to its present membership of seventy-five with a waiting list.

As a final example of the renewed interest in international law after World War II, there might be mentioned the expansion of the membership, publications, and other activities of The American Society of International Law. The Society serves as a convenient meeting ground for the practicing lawyers, government officials, and professors who are interested in this field. To mention only one or two aspects of this expansion, the Society has sponsored regional meetings all over the country as well as its annual meeting in Washington. Meetings have been held in New Orleans, and recently there was a West Coast Conference in San Francisco. It has added to its internationally known *American Journal of International Law* a new publication called *International Legal Materials* which has filled a real need in the international law field comparable to that provided by loose leaf services in many domestic areas of the law. It might be added as a postscript that the interest of the European common market in the profession has grown to the point where the Commerce Clearing House now provides a loose leaf service for that area.

What kinds of problems generate the international law business that has stimulated the growth in interest I have mentioned? The late Professor Cowles, once deputy Legal Adviser to the State Department, listed as major sources for such business resident aliens in the United States, foreign corporations doing business here, United States nationals abroad, and United States corporations doing business abroad.[7] Judge Jessup, in his *Uses of International Law*, reports a sampling of international law cases to be found in Supreme Court opinions from 1927 to 1957 and divided them into six groups: treaties, immunities and recognition, territorial questions, jurisdictional issues, matters of personal status and privileges, and a final mixed category. My own editing of

[7]Cowles, *To What Extent Will American Lawyers Need an Understanding of International Law to Serve Clients Adaquately During the Last Half of the Twentieth Century*, 7 J. LEGAL ED. 179 (1954).

Judicial Decisions for the *American Journal of International Law* from 1957 through 1960 suggests there is an even greater quantity and variety in the international law cases decided by the lower federal courts and state courts. In the following discussion, Judge Jessup's categories will be adopted for convenience.

What kinds of controversies arise concretely under his headings? Let us start with treaties. This topic embraces a wide variety of problems since treaties may and do deal with many different subjects. Treaties are international agreements, and their international effect is governed by international law, including customary rules of that law with respect to treaties. Treaties in all our courts are the supreme law of the land under the Supremacy Clause. As such, they supersede state and municipal law, whether enacted prior or subsequent to the treaty. By Supreme Court interpretation of the Supremacy Clause, treaties and federal statutes have equal status, and the latest enactment prevails in courts in the United States. It should be noted, however, that before an international forum, the treaty would prevail over a subsequent statute. The application in our courts of the later statute would in itself be a breach of the treaty under international law.

Perhaps one reason common law lawyers for so long looked askance at international law was their unfamiliarity with the subject and consequent difficulty in finding the answers. An example was the unfamiliarity and complexity of a search for a governing treaty. If successfully located, equally unfamiliar to the average lawyer were the applicable governing principles and where to find them. Comparable frustrations a generation ago arose in administrative law. The inauguration of the *Federal Register,* and the growing familiarity with and knowledge of the new subject, successfully overcame these difficulties.

Another reason, no doubt, for the earlier scorn and skepticism was the influence, conscious or unconscious, of the Austinian theory of law, known as "positivism," which required an identifiable sovereign as the law-maker. Since there was no such sovereign in the international community, ergo, international law could not be "law." More modern theories of law have taught us different perspectives on the legal process, both domestic and international, and positivism's influence has waned. Professor McDougal of Yale, a native Mississippian by the way, has developed these insights into a comprehensive theory of the process of decision-making in the international community. Put most simply, in the international arena, with a paucity of authoritative international decision-makers, national officials serve as both claimants and decision-makers. Aware of their dual function, by challenge and response, a consensus is reached as to the reasonableness of a claim, and, through comity and reciprocity, such claims come to be accepted as the governing international law. The recognition of the right of innocent passage

through territorial waters is an example of such a rule. Such a consensus may exist as customary law, or be embodied in international agreements. The law of the oceans and the developing law of space are illustrative of the application of this process, and Professor McDougal and associates have written stimulating books on each of these areas.[8] The Supreme Court decisions on the Jones and Taft-Hartley Acts, with which I began, can thus be cited as demonstrations of the use of this method by a national decision-maker. In those cases, a court rather than an executive official, was the national actor. In rendering judgment on the basis of comity and reciprocity, cognizant of the claims of other national decision-makers, it thus performed its dual function.

To return to treaties, after this digression, let us take a Friendship, Commerce and Navigation Treaty and see the bearing of its provisions on a variety of problems that arise in the course of our personal and business activities. We have a network of such treaties, many negotiated since World War II, and such treaties are in force with respect to most major trading nations, although fewer have been successfully negotiated with developing countries in Latin America or elsewhere.

Using the 1956 Treaty with the Netherlands[9] as a guide, let us take a few provisions to illustrate the scope of such treaties. The reciprocal rights and duties specified are buttressed by different types of guarantees of treatment. Some guarantees are absolute; others provide national treatment (*i.e.*, foreigners to receive the same treatment as a national); some are most-favored nation commitments, meaning equal to that guaranteed any third country in another treaty (the most-favored nation clause); and a few specify the standards of international law. Rights of entry and residence for trade and investment are granted. Nationals and companies of either party are accorded national treatment with respect to access to courts and administrative agencies. Another article provides for property protection, including due compensation for property taken, which may only be taken for a public purpose. Rights to engage in business specify national treatment, including the organization of companies, and rights of control and management. Another provision calls for national treatment in the leasing of property, but ownership of realty depends on reciprocity under state law. Thus, if Mississippi permits citizens and companies of the Netherlands to own land in Mississippi, then Mississippi citizens and companies may acquire title to land in the Netherlands. Unless such a state law clause is included, a treaty provision would override state law, as previously stated. National

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[8]McDougal & Burke, The Public Order of the Oceans (1962); McDougal, Lasswell & Vlasic, Law and Public Order in Space (1963).

[9]Treaty of Friendship, Commerce and Navigation with the Netherlands, Sept. 14, 1956 [1957] 2 U.S.T. & O.I.A. 2043, T.I.A.S. No. 3942 (entered into force Dec. 5, 1957).

treatment is provided for succession to property. The Yugoslav-Oregon decision mentioned in the beginning was based on such a clause. Other provisions deal with taxation, exchange control, imports and exports, recognition of the flags of the other's registered vessels, access to ports, control of foreign seamen by their consuls, and so on. One provision of special interest in an important area is the waiver by the respective governments, when engaged in commercial pursuits, of sovereign immunity with respect both to amenability to suit, and to execution on judgments rendered in such suits.

Although we have only scratched the surface of the many types of problems that arise and require consideration of the impact of treaties, we must go on to illustrate the problems in the second class of cases mentioned by Judge Jessup, namely, immunity and recognition cases. The waiver of sovereign immunity provision just mentioned will serve as a bridge. Historically, the law of immunities was one of the first to develop. Based on obvious notions of convenience and reciprocity, diplomatic immunity of sovereigns and their representatives was soon recognized. Coincident with personal immunity grew the doctrine of immunity of a sovereign's property. With the growth of state intervention in business and the subsequent spread of state trading by socialist countries, the problem became acute. It is in this area that the private lawyer is most apt to meet the question, and many of the earlier cases dealt with state-owned vessels engaged in a commercial mission. The immunity of warships had been recognized in the *Schooner Exchange*,[10] one of Chief Justice Marshall's most influential opinions. Was its rationale to apply to the government-owned merchant vessel engaged in trade? When this question reached the Supreme Court in *The Pesaro*[11] in the twenties, that tribunal held that, as a matter of international law binding in American courts, such a public vessel was entitled to immunity. To summarize an extensive subsequent development, the question became entangled with the issue of the relation of the courts to the executive in foreign policy matters, a question of "foreign relations" law dealt with by the *Restatement*[12] which has predicted the Supreme Court would now overrule *The Pesaro*. One basis for its prediction is the Tate Letter,[13] written in 1952 by the Acting Legal Adviser of the State Department to the Department of Justice, in which it was stated, after a review of the practice of many states, that immunity in such commercial cases was not required by international law, and that the policy of the executive in such cases in the future would be to deny requests

[10]The Schooner Exch. v. M'Faddon, 11 U.S. (7 Cranch) 116 (1812).

[11]Berizzi Bros. Co. v. S.S. Pesaro, 271 U.S. 562 (1926).

[12]RESTATEMENT, FOREIGN RELATIONS LAW OF THE U.S. § 72 (Proposed Official Draft).

[13]26 Dept. of State Bulletin 984 (1952).

by foreign governments for immunity from suit. Despite the Tate Letter, the policy of the executive has not been extended beyond immunity from suit to permit execution of a judgment, except in cases covered by a treaty provision such as that in the Netherlands Treaty. As a consequence, difficulties have arisen with respect to attachment of property as a basis for suit, and the policy change has not had as great an impact as might have been expected. Further elucidation by the Supreme Court will be required. A recent decision of the Second Circuit in *The Victory*[14] may furnish an occasion. In that case, in which no State Department view was expressed, the court held that a state vessel engaged in trading was not immune from suit. The issue can arise not only with vessels but in any international business transaction in which one of the parties is a government or government agency. Its concrete importance to the private lawyer is thus self-evident.

Recognition or non-recognition of the foreign state or government concerned in such immunity cases has had practical consequences and caused confusion. Although recognition appears to be a political rather than a legal question, its bearing on the resolution of immunity cases in national courts is frequently decisive. It is fairly clear that the unrecognized regime cannot sue. More difficult is whether it can avoid suit by a claim of immunity. Moreover, American and English courts have attributed significant legal effects to recognition and non-recognition in determining whether laws enacted by such regimes are to be given effect as applicable law in the cases before them or are to be ignored as emanating from a non-recognized source. Recognition, like immunity, involves the relation of the courts to the executive. It is clear that the executive's view is final as to whether a regime is or is not recognized. What is in controversy is whether the courts or the executive should decide the legal consequences that flow from the factual determination.

Territorial questions, another of Judge Jessup's categories, can arise in what is easily recognized as an international situation, such as the extent of the territorial sea. The Tidelands oil cases[15] which, as you doubtless know, involved, *inter alia,* Mississippi's claim to offshore oil, is an example. But boundary questions between states, *e.g.,* a possible dispute between Illinois and Iowa over their common boundary on the Mississippi River, would be determined by principles of international law. The Supreme Court has decided many such cases on this basis.

Issues of jurisdiction are, like treaty questions, apt to arise in a variety of situations. The Taft-Hartley labor organization case, previously mentioned, is only one example of the perennial problem of the extent of extraterritorial application of United States laws. In deciding

[14]Victory Transp., Inc. v. Comisaria General, 336 F.2d 354 (2d Cir. 1964).
[15]United States v. Louisiana, 363 U.S. 1 (1960).

such a question of interpretation of Congressional intent, the bases of jurisdiction recognized by international law are weighed by the Supreme Court along with evidence of Congressional intent and general considerations of reciprocity and comity in accommodating competing national claims to exercise jurisdiction over the same act or person.

Comparable issues have arisen concerning the application of our tax and trademark laws. In a trademark case, the Supreme Court has held that the Lanham Act was applicable to acts of a United States citizen in Mexico which had effects in the United States.[16] It should be noted, however, that there was no competing claim by Mexico to regulate the same acts as the case reached the Supreme Court. Compare, however, a later trademark case in which the Second Circuit held that act not to be applicable to activities by a United States company in Canada which were consistent with Canadian but not United States law.[17]

One of the greatest areas of controversy, on which much ink has been spilled, concerns the application of our antitrust laws to activities abroad by both United States and foreign nationals and companies whose action is asserted to have effects in, or to injure, the United States. A closely related question that frequently arises in such controversies is the validity of the means employed to obtain jurisdiction over foreign defendants. This is currently at issue in acute form in the investigation by the Maritime Commission into rates charged by foreign shipping lines. Commission demands for the documents of such foreign lines are being resisted in a pending suit which will probably be finally resolved by the Supreme Court. The English Parliament, in 1964, passed a statute specifically aimed at countering this investigation into the affairs of British lines.[18]

Problems of personal status and privileges in a variety of contexts also produce a large amount of litigation. Nationality, immigration, and deportation cases may be found in every advance sheet. The status of enemy aliens and their property, crucial in war, is still in controversy in pending cases. In war and peace, the rights and privileges of aliens and their property present issues not only dependent on treaties such as we have mentioned but subject as well to the application of general principles of international and constitutional law. Although the numerour claims of United States nationals and companies as aliens versus foreign states do not normally arise in our courts, their claims, when processed through the State Department and presented to international claims commissions, nonetheless require private legal services in preparing the claims for espousal by the State Department. When such claims

[16]Steele v. Bulova Watch Co., 344 U.S. 280 (1952).

[17]Vanity Fair Mills, Inc. v. T. Eaton Co., 234 F.2d 633 (2d Cir.), *cert. denied*, 352 U.S. 871 (1956).

[18]Text in III International Legal Materials 962 (Sept., 1964).

are not presented to international tribunals but are included in lump sum settlements obtained in inter-governmental negotiations, comparable services are required for the preparation of the claims; and additional services in presenting the claims to the United States Claims Commission, a tribunal created by Congress to rule on the United States claims covered by lump sum settlements.

Finally, in his "mixed" category, Judge Jessup placed such things as arms traffic, air transport, war claims, and bank accounts. A recent example of important litigation in this category, not in our courts, but before an *ad hoc* international arbitral tribunal, was the controversy between France and the United States over transit rights assertedly arising out of their bilateral Air Transport Services Agreement.[19] A comparable arbitration is pending with Italy.

This use of Judge Jessup's survey of international law issues arising in our courts as a convenient vehicle for illustrating the widespread use of international law in controverted matters in a familiar context should not obscure the important role that international law plays in counselling and in other non-litigated situations. We all know in our domestic experience that litigation is only one facet of law practice, and, in commercial matters, a principal goal is to avoid courts, if possible, and ensure the stability of transactions through carefully devised advance planning. It is in this area that the legal adviser for international shipping and trade has his most significant contribution to make.

This is not the occasion for a detailed analysis of the European Common Market and its significant impact on American trade and investment. No legal adviser with clients interested in that area can ignore its detailed study, nor can such study be fruitfully made without a basic knowledge of the principles of international law. The Common Market was created by an international treaty, and interpretation of that treaty and its relation to other treaties is indispensable to its operations. A concrete example is the constant interaction of the European treaties with the world-wide arrangements embodied in the General Agreement on Tariffs and Trade (GATT), in which the United States is a major participant. The recent well-publicized "chicken war" is illustrative.[20] After United States exporters had built up a rapidly growing market for United States chickens in West Germany, the latter country raised its barriers to such imports by virtue of obligations imposed on it by the EEC Treaty. This increase in import fees immediately presented the questions of whether the action was compatible with Germany's more general commitments under GATT and which retaliations authorized by GATT were available to the United States under the

[19]Text in III International Legal Materials 668 (July, 1964).

[20]See Walker, *Dispute Settlement: The Chicken War*, 58 Am. J. Int'l L. 671 (1964).

circumstances. A special arbitration organized under GATT auspices contributed a great deal to narrowing the controversy and preventing a rapid acceleration of retaliation and counter-retaliation. Common markets are being organized or are in contemplation in other areas, including Latin-America, and any of you who contemplate a commercial practice can anticipate a growing involvement in such questions. Nor are these problems confined to "common markets." The textile industry, for example, which is of great importance to the South, has been the beneficiary of a special bilateral trade agreement with Japan limiting textile imports.[21] The United States had to negotiate these restrictions in the light of our GATT commitments, and objections raised to them in that multilateral forum had to be taken into account by us.

Nor is the requisite knowledge for practice in this specialized area confined to common market treaties and GATT. Frequently, a detailed knowledge of United States Tariff Commission and customs procedures is inevitably involved in the same business problem, and the business counsellor may have to advise whether domestic or international relief is available, which is preferable, or even if both avenues warrant exploration. Similarly, with problems of investment not only in Western Europe but all over the world, including especially developing countries, knowledge of United Nations facilities, the investment guarantee program of our government, and facilities and procedures of international and national financing institutions, such as the World Bank, are as indispensable as any treaties that may be applicable.

In the light of this necessarily inadequate survey of areas of international law of importance to a practicing lawyer, it may be of interest to revert to the American Law Institute's selection of topics for restatement, a selection based on the need for restatement of those areas of "foreign relations" law of most importance to the American lawyer. The Restatement has four parts. Part I, *Jurisdiction*, covers the Bases of Jurisdiction, Resolution of Conflicts of Jurisdiction and Immunities from Jurisdiction. Part II deals with *Recognition* and its legal effects. Part III, *International Agreements*, covers all aspects of the subject both externally and internally. Part IV, *Responsibilities of States for Injuries to Aliens*, treats the international and United States law relating to claims for injuries to aliens and their property, including problems arising from nationalization such as were involved in the *Sabbatino* case mentioned in my introduction. Thus it can be seen that the Restatement does deal with an important segment of the practical international law problems faced by the American lawyer.

Mention should also be made of a related field of practical interest to any lawyer whose clients are involved in international trade and

[21]Japanese Cotton Textiles Agreement, Oct. 16, 1961 [1961] 3 U.S.T. & O.I.A. 3081, T.I.A.S. No. 4908 (entered into force Jan. 1, 1962).

shipping. United States admiralty law, though somewhat of a distinct specialty, has its roots in international law. Most of its rules are judge-made and were originally derived from the customary law of the sea which grew in the same way as customary international law in general. Moreover, important segments are embodied in international agreements, such as the Carriage of Goods by Sea Convention[22] and the International Rules on Collisions.[23] Because of its international character, interaction of foreign and United States law, as well as international law, are frequent, as the Jones Act case with which I commenced illustrates, as does the controversy with England over shipping rates. Finally, much of admiralty law, although not embodied in conventions, deals with internationally standardized contracts and customs, as in marine insurance, general average, and charter parties.

In focusing this discussion on the practical aspects of international law which should be of interest to any lawyer, time has not permitted treatment of many topics which are both important and exciting, such as the rapid development of space law. Moreover, as citizens, and as members of a learned profession historically devoted to leadership in the public service, we have an obligation to contribute as much as we can to efforts to resolve the crucial problems that concern all mankind. The maintenance of peace with justice under law is one such issue of pre-eminent importance. International law has a vital, though not exclusive, role to play in seeking to achieve this elusive goal. The law and procedure of the United Nations is a significant aspect of the international law that is relevant to this fateful task.

It is primarily the importance of the lawyer as a citizen leader in relation to such questions that has led Northwestern Law School to require every student to take a course in international law. The growing practical importance of the subjects, as I have attempted to show in this talk, is an additional reason for a law student to take such a course on an elective basis. May I close by expressing the hope that the possible formation of the L.Q.C. Lamar Society of International Law at this law school will contribute to the training of lawyers for practice and leadership in the challenging world of tomorrow.

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[22]United States Treaty Series, No. 931.

[23]International Regulations for Preventing Collisions at Sea, 1948, Aug. 15, 1953 [1952] 2 U.S.T. & O.I.A. 2956, T.I.A.S. No. 2899 (entered into force Jan. 1, 1954).

STATE BAR SECTION

RULES OF THE SUPREME COURT OF MISSISSIPPI

FOREWORD

The new Rules of the Supreme Court of Mississippi, adopted September 29, 1964, contain a number of substantial changes in practice and procedure before the Court. The Rules will apply to all briefs and other practice and procedure before the Court concerning cases which are set for hearing on the first Monday of March 1965 and thereafter. The last overall revision of the court rules occurred in 1952. Subsequently, individual amendments were made from time to time.[1] Since the specific rules are identified by numbers familiar to the bar, the numerical order has been retained substantially.

Perhaps the most significant changes are directed toward enabling the Judges to achieve a basic familiarity with the case and the principal issues before oral argument. The purpose is to make oral argument more meaningful. Thus Rule 7(e) requires that a party desiring oral argument must request it on the cover of his brief (although he may subsequently withdraw his request). This advance notice will give the Judges an opportunity to familiarize themselves with the case before oral argument and will make possible an arrangement of arguments more convenient to counsel and the Court. To aid the Judges in obtaining some knowledge of the case before oral argument, Rule 7(f)[2] requires that the appealing party in all direct and cross appeals file with his brief a concise statement, not exceeding two pages, setting forth "the nature and purpose of the case, the action of the trial court thereon and the points raised on appeal." The opposing party may submit a similar statement when he files his brief. Rule 7(f) is calculated to define the issues more concisely, in order that counsel may direct his argument to them.

Furthermore, Rule 7(a) requires the parties to file six copies of their briefs. Rule 7(c) limits appellant's original and rebuttal briefs together to fifty pages, thus for the first time conforming appellant's length limitation to the same limitation as appellee's.

In another significant change, Rule 16 has eliminated the former practice of a return day for motions. A motion is at issue after the

[1]The 1952 Rules, as amended through July 1958, were annotated in 29 Miss. L.J. 372 (1958). Also, Shepard's Mississippi Citations contains a "Court Rules" section.

[2]This Rule is modeled on Rule 13A of the Tennessee Supreme Court.

opposite party has three full days notice consisting of a copy of the motion and the supporting brief. Movant is required to file a brief in support of his motion, and if none be filed, it will be dismissed. Requests for oral arguments on motions must also be given. Rule 16(b).

A substantial addition was made to Rule 32 (Remedial Writs). Now, except in cases of emergency, the application for any remedial writ must first be submitted to the judge of the appropriate trial court.[3] Several requirements concerning the content of an application for a remedial writ are also imposed by Rule 32.

Other changes of somewhat less prominence are effected by the new Rules. Suggestions of error must now be filed within fifteen days after a decision is rendered on the merits. No provision is made for the fifteen additional days formerly available. Rule 14(a). Motions to correct a judgment must now be filed within thirty days, instead of sixty days, from the handing down of the opinion. Rule 19. Former Rule 6(3), stating that the right of review is not dependent upon the filing of a motion for a new trial in the trial court, has been deleted, because this aspect of the scope of appellate review is established by case law. Other minor changes are found in Rules 1, 2, 17, 18, 20, and 26. Rule 36 is new in its entirety.

In summary, the new Rules are designed to make oral arguments more helpful to lawyers and the Judges, to facilitate the setting of the docket and disposition of motions, and to clarify practice in numerous procedures before the Court.

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[3]This Rule does not affect the statutory requirement of MISS. CODE ANN. § 1992.5 (1956), that leave must be obtained from the Supreme Court to file a petition for a writ of error coram nobis in the trial court, when an appeal from a criminal conviction has been affirmed by the Supreme Court.

RULES AND ANNOTATIONS*

Adopted September 29, 1964

Ordered that the following rules be adopted for the government of this Court, superseding all others heretofore in force and not hereby readopted.

RULE 1. TRANSCRIPT—HOW PREPARED. (a) Every transcript of record brought to this Court shall be distinctly and plainly printed, or typewritten; if typewritten, paper not less than eight, nor more than eight and one-half inches wide and fourteen inches long shall be used, and only on one side of every leaf; each page shall be numbered consecutively at the bottom, at or near the center, and there shall be a blank margin at both top and bottom of not less than one inch, a blank margin at the right side of not less than one-half inch, and a blank margin at the left side of not less than one and one-half inches. Transcripts may be typewritten on linen paper, to weigh not less than eight pounds to one thousand sheets, and must be double spaced. Only black record typewriter ribbons shall be used in making up transcripts, and these must not be worn or dim. Pica type or larger should be used. All photographs, maps, and other exhibits capable of being bound in the record shall be inserted in the record at the place where first identified or introduced. The record shall not contain any brief, letter, or memorandum on legal or factual arguments made before any lower court, board, commission or agency. When the appeal involves a case originating before any board, commission, or agency, any memorandum, letter, notice, or other document included in the record which is on paper smaller than the pages of the record shall be fastened to a blank sheet of paper of the same size required of the record and properly numbered and indexed; and all parts of the record which may be sent up from such board, commission, or agency shall be numbered and indexed as in other cases.

(b) No carbon or other duplicates, nor transcripts typewritten with copying ink, will be received. The clerk shall preface the record with a comprehensive index of the entire record numbered seriatim. The typewritten transcript shall be securely bound in non-flexible pasteboard covers with marbled sides in volumes of about an equal number of

*The staff of the *Mississippi Law Journal* compiled and edited the annotations to the new Rules of the Supreme Court contained herein. These annotations cover the period 1958-1964. The Rules were previously annotated in 29 MISS. L.J. 372 (1958).

pages, not to exceed in any case two hundred (200) pages in a volume, for the payment of which binding appellant will be allowed one dollar ($1.00) per volume to be taxed with the costs. The appellant may cause the transcript to be bound as above described, or he may, at the time of taking his appeal, deposit with the clerk of the court from which the appeal is taken a binding fee of one dollar ($1.00) per volume of two hundred (200) pages. Counsel shall not put any markings on the original record.

(c) In such cases the clerk shall transmit the unbound transcript, with the binding fee, to the Clerk of this Court. Transcripts shall not be folded, but may be rolled for transmission if not bound as required; and if not bound, the sheets shall not be fastened together.

(d) The Clerk of this Court shall not accept any record made up in violation of these rules, and for the making and filing of such a record no clerk shall be allowed any fees whatever.

(e) The Clerk of this Court shall refuse to receive a record wherein the court reporter's transcript is not indexed as required by Section 1636, Code 1942. When a transcript not so indexed is tendered, the Clerk shall return the same to the clerk of the court below; and at the same time the Clerk of this Court will notify the attorneys for the appellant, by letter or letters, of his action and the reason therefor.

JUDICIAL DECISIONS

Mabry v. State, 245 Miss. 143, 150, 146 So. 2d 543, 544 (1962). Receipt by appellant's attorney of the clerk's notice of the date set for the hearing is not essential to appeal as the appellant should know whether he has appealed his case and filed his assignment of error and brief within the time required by the Supreme Court's Rules.

Gangloff v. State, 246 Miss. 764, 151 So. 2d 199 (1963). A second suggestion of error is not permitted by the Supreme Court's Rules.

RULE 2. TRANSCRIPT—WHAT TO CONTAIN. A transcript shall be compiled in chronological order and shall not contain any part of the case except the pleadings, evidence, instructions, bills of exceptions and the order, judgment or decree appealed from, unless the appellant shall, by writing, request other matters specified to be embraced in the transcript, a copy of which shall be annexed to the transcript; and exhibits to declarations, bills, answers, depositions, etc., shall immediately follow the particular plea or deposition first referring to them and shall be copied but once. The several answers of witnesses as made in depositions shall each follow consecutively the particular interrogatory to which they are responsive; and no commission to examine a witness,

nor certificate of a commissioner to a deposition, nor any proceedings to obtain such a commission, shall be inserted in any transcript except where a question as to the sufficiency or legality thereof appears from the record to have been decided; and no fee shall be allowed for anything besides these matters required to be embraced in the transcript. The transcript shall contain only those portions of the record, proceedings, testimony, and evidence designated by counsel for appellant and appellee, in accordance with Mississippi Code of 1942, Rec., Sec. 1640, as amended by Laws 1964, Ch. 305.

JUDICIAL DECISIONS

Hansen v. Atkinson, 227 Miss. 192, 86 So. 2d 16 (1956). Appeal statutes relating to record on appeal clearly indicate the legislative intent that, when the court reporter's notes have been filed in any case, the original copy of the notes shall be used by the clerk in making up the record on appeal. MISS. CODE ANN. §§ 1189, 1640, 1644 (1956).

Crum v. Upchurch, 232 Miss. 74, 88-89, 94 So. 2d 321 (1957). Where the Supreme Court could not determine without reading the entire record on appeal and considering briefs on merits whether or not certain pleadings and decrees were properly part of the record, the Court would hold in abeyance a motion to strike such matter from the record until a consideration of the case on its merits.

Huddleston v. Peel, 238 Miss. 798, 804-05, 120 So. 2d 776, 777-78 (1960). Where the record contained process on all of defendants and return thereon so that the record showed a total of fifteen pages which it should not contain, and it also contained proof of publication for nonresident defendants consisting of two pages and duplication of many documents, the complaining party was entitled to have the costs retaxed.

Temples v. First Nat'l Bank, 239 Miss. 446, 458, 125 So. 2d 543, 544 (1960). Inclusion in transcript of certain instruments and documents consisting of process on defendants, subpoenas for witnesses, and duplication of instruments, was improper and allowance of chancery clerk's fees for such documents was improper.

Moffett v. International Paper Co., 243 Miss. 562, 568, 138 So. 2d 492 (1962). Subpoenas for witnesses, motion for subpoena duces tecum, and lis pendens notice were wholly unnecessary for consideration of case and should not have been included in record.

RULE 3. AGREED TRANSCRIPT. By agreement of parties or their attorneys, made in writing and attested by the Clerk of the Court in which any case may be pending or record existing (which agreement shall be

filed and made a part of the transcript of such record), such parts of the record and proceedings as shall be agreed shall constitute the transcript of the record to be brought to this Court and shall be certified as such and be considered a full transcript in this Court for the consideration and final adjudication of the cause here.

RULE 4. SUGGESTION OF DIMINUTION OF RECORD. If a record be imperfect, diminution may be suggested by either party, and a writ of certiorari will be awarded, provided that if the filing of such a suggestion has been unnecessarily delayed to the prejudice of the opposite party, the writ will be awarded only upon such terms as the Court may impose, or it may be refused altogether.

RULE 5. RECORDS AND PAPERS—HOW FILED. No record or other paper shall be considered as filed until so marked by the Clerk—process of this Court excepted—and the Clerk shall endorse the date of filing.

RULE 6. ASSIGNMENTS OF ERROR. (a) At least thirty days before the date when a case is set for hearing the appellant shall file an assignment of errors which shall set out separately and particularly each error asserted and intended to be urged, to which shall be appended a certificate that a copy thereof has been delivered or mailed, postage prepaid, to opposing counsel. Cross-appeals may be taken, without bond, by the appellee and cross-appellant by filing his cross-assignment of errors at the time the brief of appellee is due under Rule 7.

(b) No error not distinctly assigned shall be argued by counsel, except upon request of the Court, but the Court may, at its option, notice a plain error not assigned or distinctly specified.

JUDICIAL DECISIONS

Page v. Lang, 234 Miss. 122, 125, 105 So. 2d 552, 553 (1958). The Court, at its own option, under authority of Rule 6(2), Revised Rules of the Supreme Court, took notice of errors which were not assigned.

Mid-South Pipeline Contractors, Inc. v. Citizens Nat'l Bank, 239 Miss. 621, 626, 124 So. 2d 697, 699 (1960). Where appellant did not file an assignment of error within the thirty days required by Rule 6, the Court concluded to render their decision on the merits of the case instead of on this oversight on the part of the appellant to comply with the Rules of the Court.

Swartz Cadillac Co. v. Brown, 240 Miss. 326, 123 So. 2d 221 (1960). Where appellant failed to give notice to the court reporter to transcribe his notes within the prescribed ten-day period, such reporter's transcript could not be considered on appeal; but since appellant had filed proper appeal bond and the circuit clerk had sent to the clerk of the Supreme

Court all of the documents of his file, except the reporter's transcript, the Court could consider this record as the record on appeal, but appellant must file a proper assignment of errors in compliance with Rule 6.

Overstreet v. State, 240 Miss. 861, 864, 128 So. 2d 115, 117 (1961). Failure of the state to obtain instructions properly defining its burden of proof presents a clear case for application of Rule 6(2), permitting the Supreme Court, at its option, to notice a plain error not assigned or distinctly specified.

Rivers Constr. Co. v. Dubose, 241 Miss. 527, 539-40, 130 So. 2d 865, 870-71 (1961). The Court reaffirmed its approval of the prevailing custom of allowing cross-assignments of error to be filed at the time appellee's brief is due, until a rule regulating the time for filing the cross-assignments is adopted.

Canal Ins. Co. v. Howell, 248 Miss. 678, 690, 160 So. 2d 218, 223 (1964). The Court sustained a motion to docket and dismiss an appeal because appellant had failed to file an assignment of error within the time permitted by Rules 6(1) and 7(1).

RULE 7. BRIEFS. (a) Appellant's brief and five copies thereof shall be filed not later than thirty (30) days before the date the case is set for hearing; appellee's brief and five copies thereof shall be filed not less than ten (10) days before the date the case is set for hearing, and any rejoinder brief and five copies thereof shall be filed not later than three (3) days before the date the case is set for hearing.

(b) The contents of briefs are for the determination of counsel, but those briefs are of most assistance to the Court in which there precedes the argument of counsel: First, a concise statement of the case so far as essential to an understanding of the questions presented for determination with specific references to the precise places in the record where the points discussed may be found; and, second, a "brief of the argument," which should consist of the points or propositions of law, or fact, to be discussed with the citation of authorities relied upon in their support.

(c) Appellant's original and rebuttal briefs together shall not exceed fifty (50) pages, and appellee's brief shall not exceed fifty (50) pages. They shall be typewritten or printed; and if typewritten, shall be in black non-copying ink, double-spaced (exclusive of quotations and footnotes), on white paper, without the name of any person or advertising matter thereon. There shall be appended thereto a certificate that a copy of it has been delivered or mailed to opposing counsel; and if mailed, the certificate to appellant's original brief must contain the further statement that it was done not later than two days before the filing thereof. Every

brief shall be distinctly and plainly printed, or typewritten, and if typewritten, on paper not exceeding eight and one-half inches in width and not exceeding fourteen inches in length, on one side of every page; and each page shall be numbered at the bottom, at or near the center, and there shall be a blank margin at the top of not less than one and one-half inches and at the bottom of not less than one inch, a margin on the right side of not less than one-half inch, and a blank margin on the left side of not less than one and one-half inches. The type shall not be smaller than pica. [The following was added to Rule 7(c) and adopted on January 12, 1965.] Subject to other requirements of these rules, briefs may be reproduced also by offset printing, photocopy, or mimeograph process, or by any substantially similar method, provided the product is clear, easily readable, and without glare.

(d) Any brief containing language showing disrespect or contempt for the trial court will be stricken from the files, and this Court will take such further action relative thereto as it may deem proper.

(e) If oral argument is desired by either party, he shall give notice thereof on the cover or front page of his brief by stating thereon, "Oral Argument Requested." Such request may be withdrawn by written or oral notice to the Clerk of the Court and opposing counsel.

(f) The appealing party in all direct appeals and cross-appeals shall file a brief statement, not exceeding two pages, setting forth the nature and purpose of the case, the action of the trial court thereon and the points raised on appeal. The opposing party may file a similar statement. All such statements, the original and five copies thereof, shall be filed at the time of the filing of the briefs.

Judicial Decisions

Dozier v. State, 247 Miss. 850, 851-52, 157 So. 2d 798, 799 (1963). The purpose of appellate briefs and arguments is to present to the Court in precise form the points and questions in controversy, to assist the Court in arriving at proper conclusions, and to notify opposing counsel of questions to be presented and authorities to be relied upon.

Canal Ins. Co. v. Howell, 248 Miss. 678, 690, 160 So. 2d 218, 223 (1964). When appellant fails to file his assignment of errors or brief within the time permitted by Supreme Court Rule 7(1), a motion to docket and dismiss the appeal will be granted.

Rule 8. Return Days. Except as may be otherwise provided by law, the first day of each term and the first Monday of January, May, and July shall be the return days for all appeals and all process in civil cases.

JUDICIAL DECISIONS

Hargraves v. Hamilton, 161 So. 2d 179, 182 (Miss. 1964). In this case five terms and three years had elapsed since the appeal bond had been filed. Appellants claimed they had made every effort to secure the transcribed records and had released the "oil runs" to appellees, but appellees denied agreements to delay appeal. The Court held that the appeal was subject to dismissal.

RULE 9. CALL AND ORDER OF DOCKET. (a) Except as may be provided by special order, all civil cases will be called for argument and submission in the order in which they stand on the docket.

(b) At least forty-five (45) days before the first Monday of each month, the Clerk shall mail to each lawyer or firm of lawyers interested therein a list of cases to be called during that month; but the failure of an attorney to receive this list shall not entitle him to have a case in which he is of counsel passed or reinstated after submission or dismissal.

(c) On the assembling of the Court on each Monday, the entire number of cases set for the week will be called, with a view to the disposition of such of them as are not to be argued.

RULE 10. ARGUMENT OF COUNSEL. In the event oral argument is requested under Rule 7(e), only two counsel will be heard for each party on the argument of a case. The time allowed therefor will be determined by the Court in each case and may be apportioned between the counsel on the same side in their discretion, provided always that a fair opening of the case shall be made by the party having the opening and closing argument.

RULE 11. NO REVERSAL FOR HARMLESS ERROR. No judgment shall be reversed on the ground of misdirection to the jury, or the improper admission or exclusion of evidence, or for error as to the matter of pleading or procedure, unless it shall affirmatively appear, from the whole record, that such judgment has resulted in a miscarriage of justice.

JUDICIAL DECISIONS

Hartford Fire Ins. Co. v. Jones, 235 Miss. 37, 43, 108 So. 2d 571, 573 (1959). In a mistaken belief that an appraisal made under the terms of a fire policy constituted an arbitration and award, the insured obtained an order confirming the appraisal as an arbitration award. The policy was admittedly in force at the time of loss, and the judgment entered for insured was in accordance with the appraised value and policy limits. The Court affirmed on the ground that it did not result in a miscarriage of justice.

Matheny v. Illinois Central R.R., 235 Miss. 173, 180, 108 So. 2d 589, 590 (1959). The undisputed testimony reflected and the jury evidently concluded that the driver was negligent, and the driver's widow had submitted to the jury a comparative negligence instruction. The Court held that a judgment on the verdict for only $10,000 would not be reversed and remanded on the issue of damages alone on the ground that the damages were so grossly inadequate as to demonstrate bias and prejudice on the part of the jury, and that there was no reversible error in the instructions.

Wallace v. J. C. Penney Co., Inc., 236 Miss. 367, 373, 109 So. 2d 876, 878 (1959). In a customer's action against a store for personal injuries received when she slipped and fell on a slippery wet floor of the store foyer, the instruction on assumption of risk was erroneous because it eliminated any distinction between assumption of risk and contributory negligence and denied to the jury its right to weigh the respective negligence, if any, of the parties. The error was not reversible error since the customer failed to establish a cause of action.

Reed v. State, 237 Miss. 23, 32, 112 So. 2d 533, 536 (1959). Where the overwhelming weight of the evidence reflected the guilt of the defendant, and where impartial jurors, duly mindful of the obligations of their oaths, could not have reached a different result, the judgment of conviction would not be reversed because of erroneous instruction given to the jury.

Williams v. State, 239 Miss. 839, 125 So. 2d 535 (1960). Under Rule 11, the erroneous admission or exclusion of evidence by the trial court is not a ground for reversal unless, when looking at the entire record, it can be seen that there has been a miscarriage of justice. A failure to sustain a motion for a subpoena duces tecum, when there was no verified petition filed in the case, was not reversible error when the records, if produced, would not have been determinative of the issue.

Stokes v. State, 240 Miss. 453, 477, 128 So. 2d 341, 350 (1961). The Court said it would look to the whole record in a case where the defendant did not show that he was prejudiced in the trial of the case due to his absence on the motion for a new trial.

Flora v. Fewell, 241 Miss. 345, 348-49, 131 So. 2d 187, 188 (1961). Where the evidence made an issue for the jury on the question of negligence, and the verdict was not against the great weight of the evidence, Rule 11 had no application.

Anderson v. Sills, 242 Miss. 238, 246-47, 134 So. 2d 482, 484-85 (1961). A giving of an instruction excluding plaintiff's alternative theories was error but not reversible error where other theories were adequately covered by other instructions.

Illinois Central R.R. v. Williams, 242 Miss. 586, 606, 135 So. 2d 831, 839 (1961). The admission of opinion evidence in a death action that the railroad crossing at which the collision occurred was unusually dangerous, although error, was not grounds for reversal where the chancellor, as the trier of facts, had admitted the evidence for whatever it might be worth, and had apparently attached no particular importance to it.

Traxler v. State, 244 Miss. 403, 407, 142 So. 2d 14, 15 (1962). It was error to allow the sheriff to testify concerning the plea of guilty entered by the defendant's stepson in Youth Court; but in view of the undisputed evidence as to the defendant's guilt of illegal possession of a still, which was located in the house where the defendant and his stepson were found, reversal would not be required.

Jones v. State, 244 Miss. 596, 145 So. 2d 446 (1962). In a prosecution for manslaughter by culpable negligence in the operation of an automobile, it was prejudicial error to give instructions from which the jury could conclude that mere proof of the defendant's operating his automobile while in an intoxicated condition would be sufficient proof in itself of the defendant's wanton or reckless disregard for the safety of human life, or such indifference to the consequences of his act under surrounding circumstances as would render his conduct tantamount to wilfulness. The harm resulting from the giving of such instruction was not neutralized by other instructions given.

Winters v. State, 244 Miss. 704, 707, 146 So. 2d 350, 351 (1962). Rule 11 does not apply where there is substantial error and probable prejudice resulting from it in the giving of a peremptory instruction for the state in a criminal prosecution and requires a reversal where there is conflict in the evidence on the issue of guilt.

Crump v. Brown, 246 Miss. 631, 637-38, 151 So. 2d 822, 824 (1963). In a case in which plaintiff, an adult pedestrian, had moved quickly into the highway and defendant automobile operator had turned to avoid pedestrian but the pedestrian turned back and was struck, the trial court's grant of a sudden emergency instruction without requiring the operator to exercise such care as a reasonably prudent and capable driver would use under the unusual circumstances was reversible; and, in view of the closeness of the case on the facts, Rule 11, which precludes a reversal on grounds of misdirection to jury unless it affirmatively appears from the whole record that the judgment resulted in miscarriage of justice, was not applicable.

Frierson v. Sheppard Bldg. Supply Co., Inc., 247 Miss. 157, 171, 154 So. 2d 151, 156 (1963). The allowal or the exclusion of certain testimony by the chancellor does not constitute reversible error where the Supreme Court cannot find both error and harm therefrom.

James v. State, 248 Miss. 777, 781, 160 So. 2d 695, 696 (1964). The two instructions granted the State did not constitute reversible error when the instructions were considered as an entirety; the second instruction was correct and the first should have been read along with it.

Knight v. State, 248 Miss. 850, 857-58, 161 So. 2d 521, 522 (1964). The court's refusal to permit defense counsel to establish identification of the defendant by race on cross-examination of a state witness in a disorderly conduct prosecution was not prejudicial or harmful where the jury saw her at the time and could tell whether she was white or Negro.

Mississippi State Highway Comm'n v. Fisher, 161 So. 2d 780, 781 (Miss. 1964). An instruction that if the jury believed that the evidence offered on behalf of condemnee in condemnation proceeding was just as strong as the evidence on behalf of condemnor, that the condemnor had failed to meet its burden of proof and that the jury should then return a verdict for condemnee, was erroneous as constituting comment on the weight of the evidence; but where the error was not harmful or prejudicial to condemnor, it does not call for a reversal.

Diamond v. Killegrew, 163 So. 2d 738, 739 (Miss. 1964). A judgment was affirmed where it appeared that alleged errors in admission and exclusion of evidence were not of sufficient gravity to be denominated harmful or prejudicial.

Hernando Bank v. Davidson, 164 So. 2d 403, 406 (Miss. 1964). Where, in a proceeding for review of a decision of the banking board approving an application for a new state bank, the appellant fails to show that the actions of the board in granting the certificate of authority and the chancery court in affirming same were "substantially prejudicial," such order and decree must be affirmed.

RULE 12. NEW TRIAL AS TO PART. In case a judgment is reversed and a new trial granted, it shall be only a new trial of the question or questions with respect to which the verdict or decision is found to be wrong, if separable.

JUDICIAL DECISIONS

Wilder v. Currie, 231 Miss. 461, 486, 97 So. 2d 384, 385 (1957). A motion before the Supreme Court to remand a question to the trial court will be denied where the record is wholly silent on the question involved.

Statham v. Blaine, 234 Miss. 649, 669-70, 108 So. 2d 213 (1959). Where a declaration set forth twenty counts and a directed verdict in favor of defendant was sustained on all the counts except 17 and 18, these two counts being capable of separation without injury or prejudice, the judgment would be reversed and remanded only as to counts 17 and 18.

RULE 13. NEW TRIAL AS TO DAMAGES ONLY. When a judgment is reversed and a new trial ordered because the damages are excessive or inadequate, and for no other reason, such judgment shall be set aside only in respect of damages and shall stand good in all other respects.

JUDICIAL DECISIONS

Index Drilling Co., Inc. v. Williams, 242 Miss. 775, 791-92, 137 So. 2d 525, 531-32 (1962). Where the mathematical computations of the estimated loss of earnings and the hypothetical figures for pain and suffering were the main testimony in a personal injury case concerning damages to the plaintiff's foot which resulted in an award of $63,500, the Supreme Court found the jury's verdict grossly excessive and reversed and remanded on the amount of damages only.

Cherry v. Hawkins, 243 Miss. 392, 402, 137 So. 2d 815, 818-19 (1962). In a new hearing as to damages in a servant's suit against master, all the facts could be presented on the question of the negligence of the parties so that the jury would have the right to apportion damages under the comparative negligence statute.

RULE 14. SUGGESTION OF ERROR. (a) Within fifteen (15) days after a decision is handed down on the merits of a case or on a motion, any party may file a written suggestion of error of law or fact therein.

(b) An adjournment of Court less than fifteen (15) days after the rendition of a judgment shall not preclude the filing of a suggestion of error therein, but the same may be filed with the Clerk within the time prescribed for presenting such suggestion of error to the Court, whereupon all proceedings on the judgment shall be stayed until it shall be acted upon at the next session of the Court, unless a majority of the judges of the Court shall certify in writing to the Clerk prior to the next term that they have considered the suggestion of error and have determined to overrule it; upon receipt of such certificate such proceedings shall be had as if a suggestion of error had not been filed.

(c) No reply to a suggestion of error shall be filed, unless the Court, by special rule otherwise, shall call therefor. But no suggestion of error will be sustained to the prejudice of the adverse party until he has been given an opportunity of replying thereto. After a suggestion of error has been sustained, or overruled, by the Court, no further suggestion of error shall be filed by any party.

(d) Any suggestion of error containing language showing disrespect or contempt for this Court will be stricken from the files, and the Court will take such further action relative thereto as it may deem proper.

JUDICIAL DECISIONS

Carter v. Berry, 243 Miss. 321, 356, 140 So. 2d 843, 845 (1962). After the appellees filed their brief on suggestion of error, the Court's request for a reply by appellants was complied with, to which the appellees submitted a reply brief.

Carter v. Berry, 243 Miss. 321, 378, 142 So. 2d 13 (1962). A motion for authority to file a second suggestion of error was overruled because the case had been thoroughly considered on the merits and on a first suggestion of error.

Decker v. Bryan Bros. Packing Co., 162 So. 2d 648, 650 (Miss. 1964). A decision of the court becomes final upon the passage of time in which a suggestion of error could be filed, this being within fifteen days after an opinion is handed down, or in the event a suggestion of error is filed which is not sustained, the decision becomes final upon its being overruled.

RULE 15. PAPERS OUT OF OFFICE. The person through whose fault a record is not in the courtroom when the case is called for submission shall be fined the sum of twenty-five dollars ($25.00).

RULE 16. MOTIONS. (a) No motion will be considered until the opposite party shall have had at least three full days notice, by mailing or delivery to such party a copy of the motion and brief in support thereof. The respondent to such motion may file an answer and brief. Movant shall file with his motion a brief in support thereof, and if no supporting brief be filed, such motion shall be dismissed; and no motion once disposed of, or dismissed, shall again be heard.

(b) Any party desiring oral argument on a motion shall give notice on his brief as required by Rule 7(e). Such arguments will be heard by the Court on Mondays at the heel of the regular docket. Except in rare instances oral arguments on motions are not necessary if such motions have been fully briefed.

JUDICIAL DECISIONS

Pennyan v. Alexander, 226 Miss. 419, 84 So. 2d 691 (1956). A certificate in connection with a motion to dismiss an appeal, stating that a copy of the motion had been mailed by United States mail, postage prepaid, to the attorney for the appellant, at his usual address, complies with the Rules of the Court as to notice of a motion to dismiss an appeal.

Jackson Ready-Mix Concrete v. Young, 230 Miss. 644, 653, 93 So. 2d 645, 649 (1957). A motion of the claimant's attorneys for the allowance of additional attorneys' fees could not be passed on for the reason that no service of the motion was had upon the attorney for the appellants,

since there was no certificate attached thereto that the notice required by the Rules of the Court as to all motions was given.

Tighe v. Tighe, 239 Miss. 666, 670-71, 124 So. 2d 843 (1960). The husband appealed to the Supreme Court from a divorce decree and the wife filed a motion for additional attorneys' fees on appeal stating that the Supreme Court's policy was to award attorneys' fees on appeal of one-half of that allowed by trial court and that her counsel on appeal rendered good and valuable services in her behalf. The Court held such motion substantially equivalent to a brief in support of the motion as required by Rule 16, and *Lewis v. Lewis,* 203 Miss. 355, 35 So. 2d 441 (1948), was not controlling.

RULE 17. CONDITIONS FOR WITHDRAWAL OF COMPLETED RECORDS FROM CLERK'S OFFICE. Records of cases completed and finally decided by this Court, or parts thereof, shall not be withdrawn from the office of the clerk, except under the following circumstances:

(a) No one except a member of the bar in good standing, or circuit, chancery, and county court judges may withdraw from the clerk's office any such record. Any persons entitled to withdraw such record shall post with the clerk a cash deposit of $10.00, which shall be refunded upon return of such records in compliance with this rule. No such records shall be held out of the clerk's office more than 30 days. The deposit shall be forfeited at the first sitting of the Court following the failure of any person to return a record within the time limit herein prescribed, and such other action may be taken in respect thereto as the circumstances warrant.

(b) The Clerk of this Court shall keep and maintain a separate ledger book dealing solely with records and documents which have been withdrawn from the clerk's files in accordance with this rule. He shall advise the Court in writing on the first Monday of each month of any such records, briefs, or any part thereof which have not been returned to his files in compliance with this rule. A copy of this rule shall be attached to any records or documents removed from the clerk's office.

RULE 18. DISMISSED CAUSE—HOW REINSTATED. No cause that has been dismissed for any reason shall be reinstated unless a sworn motion is filed within fifteen (15) days of each dismissal setting forth probable error in the proceedings and good cause for reinstatement.

RULE 19. MOTION TO CORRECT JUDGMENT OR RETAX COST—STATUTORY PENALTY. All motions to retax costs or for the awarding or disallowance of five per cent (5%) damages on appeal or to correct any judgment shall be filed within thirty (30) days from the date of the handing down

of the opinion. There shall be appended to every such motion a certificate of counsel that he has personally read the original or a copy of the judgment in question, and that the relief sought by the motion is not already contained in the judgment; and the clerk shall not file any such motion unless such certificate is appended. Provided, however, that when such allowance or disallowance of costs or other matter affecting the judgment has been incorporated in the opinion, the rule applicable to the filing of suggestions of error shall apply.

JUDICIAL DECISIONS

Richardson v. Cortner, 232 Miss. 885, 891, 105 So. 2d 456 (1958). Where motions to retax costs and to order execution to issue were not filed within 60 days as required by the Revised Rules of the Supreme Court, Rule 19, the Court would suspend the rule under Rule 33, where it manifestly appears that to do otherwise would result in injustice.

Page v. Lang, 234 Miss. 122, 126, 111 So. 2d 927 (1959). Generally, the Court will not allow a motion to retax costs unless filed within sixty days. To remove a situation from the application of this rule one must show some prejudice or injustice.

Mississippi Power & Light Co. v. Town of Coldwater, 234 Miss. 615, 648, 112 So. 2d 222, 224 (1959). Appellants' motion designated "Motion to Re-tax Costs" was not in fact a motion to retax costs, but if this were a motion to retax costs, as contemplated in Rule 19 of the Rules of the Supreme Court, the Court would suspend Rule 19 under the authority of Rule 33 and sustain the motion, since to do otherwise would result in manifest injustice.

Hyde Constr. Co. v. Highway Materials Co., 248 Miss. 564, 577-79, 162 So. 2d 856, 857 (1964). In the absence of incorporation of allowance of costs in the Supreme Court opinion, a motion to retax costs filed more than sixty days after the date of the Supreme Court's order, but less than sixty days after filing of the suggestion of error, was timely.

RULE 20. DOCKET—HOW CALLED. At each sitting of the Court in term the docket shall be taken up in its order.

RULE 21. FAILURE TO PROSECUTE—CAUSE DISMISSED. When any case shall be called for trial in its order, if no counsel appear or no brief be filed on behalf of the appellant, the cause shall be dismissed for want of prosecution.

RULE 22. CALCULATIONS. (a) When a party relies on an excess in the calculation of interest or damages as a reason for reversing a judgment, a true calculation shall be presented to the Court, in writing and figures, with a certificate by some counsellor not interested in the cause,

that the calculation is correct; and no such error will be noticed unless so presented to the Court.

(b) When a complaint is made, in a motion to retax the costs incurred in this Court, that a fee allowed based on the number of words of an instrument, or transcript thereof, or the transcript of the record as an entirety, is incorrect, the motion shall be accompanied by a written statement of the true number of such words, with a certificate of its correctness by a competent disinterested person; without which no such complaint will be considered.

Judicial Decisions

Wentworth v. Forne, 242 Miss. 883, 892-94, 139 So. 2d 858, 859 (1962). The court reporter's bill for typing the transcript on a "rule of thumb" of 400 words per page was incorrect, in view of a showing that the average number of words per page was 181 and, therefore, costs would be retaxed.

Rule 23. Agreement of Counsel. No agreement between counsel will be regarded unless reduced to writing, and signed and filed by them.

Judicial Decisions

Hargraves v. Hamilton, 161 So. 2d 179, 182 (Miss. 1964). In this case five court terms and three years had passed since appeal bond was filed. Appellants claimed they had made every effort to secure the transcribed records and had released the "oil runs" to appellees, but appellees denied the alleged oral agreement to delay the appeal. The court held that the appeal was subject to dismissal, since the agreement must be in writing.

Rule 24. Authority of Counsel—When Required. On motion supported by affidavits, any counsel may be required to produce his authority, or show satisfactory evidence thereof, for prosecuting any appeal in this Court; and on failing to produce such authority, or furnish such evidence, the appeal may be dismissed.

Rule 25. Criminal Docket—When Called. Criminal cases may be set by the Chief Justice for call on any Monday when the Court is sitting, and in such numbers as he may designate.

Rule 26. When Appellee May Not Waive Time. After a case has been called on the docket, the appellee shall not be permitted to waive the time within which citation is required to be served, nor to enter his appearance for trial of the cause at that term, except upon leave of the court.

Rule 27. Attorneys Must be Admitted to Practice. Attorneys at

law who have not been admitted to practice in this Court shall not be permitted to argue orally, or file briefs or any paper in any cause in this Court.

RULE 28. PAPERS NOT FILED AFTER SUBMISSION. The Clerk shall not file with the papers of any cause any paper after the cause has been argued, or submitted, except by leave of the Court.

RULE 29. ORIGINAL PAPERS—WHEN CONSIDERED. Whenever it shall, in the opinion of the Judge or Chancellor, be necessary or proper that original papers of any kind should be inspected in the Supreme Court, such Judge or Chancellor may make such rule or order for safekeeping, transporting, and return of such original papers as to him may seem proper; and such papers will be considered in connection with the transcript.

RULE 30. COSTS PAID BY APPELLANT—WHEN MANDATE RETAINED. When costs are awarded in this Court against the appellee, and there shall have been a return of nulla bona to an execution against him, and the costs shall be paid by appellant, no mandate shall issue upon the application of the appellee, until he shall pay into the Court, for the use of appellant, the costs paid by him.

RULE 31. PENALTY FOR VIOLATIONS OF THE RULES OF THIS COURT. Any litigant, who by himself or his counsel, fails to comply with any of the provisions of the foregoing rules, shall, on motion of the party aggrieved, be taxed with such proportion of the appeal costs as in the judgment of the Court may seem just and proper in addition to any other penalty which may be provided by the rules.

RULE 32. REMEDIAL WRITS. No application for supersedeas, or any other writ or remedial process mentioned in Section 1657, Code 1942, except in cases of greatest emergency, shall ever be acted on, in any case pending in any court, by any member of the Supreme Court, ex parte; but every such application, except in cases of greatest emergency, shall be accompanied by a certificate of written notice served on the opposite party, or his counsel, or some of them, at least three (3) days before the hearing; and all such applications will be acted upon only when both sides are represented at the hearing, or after such three days notice, duly certified as above. Except in cases of emergency, the application for any remedial writ shall first be submitted to the judge of the appropriate trial court. Application to a Supreme Court Judge for any remedial writ shall be under oath by counsel for applicant. It shall state the name and office of the Judge or Supreme Court Justice to whom it was first submitted, his denial of it, and the reasons, if any, given by him for its denial, and shall have attached thereto a certified copy of the trial judge's order, if any, denying the writ.

Applications for remedial writs directed to individual Supreme Court Judges, and orders taken thereon, shall be filed in the office of the Clerk of the trial court.

RULE 33. RULES MAY BE SUSPENDED. These rules shall be considered as general rules for the government of the Court and the conducting of causes; and as their design is to facilitate business and advance justice, they may be relaxed or dispensed with by the Court in any case where it shall be manifest to the Court that a strict adherence to them will work surprise or injustice.

JUDICIAL DECISIONS

Richardson v. Cortner, 232 Miss. 885, 891, 105 So. 2d 456 (1958). The Court allowed a motion to retax costs, though not brought within sixty days as required by the Supreme Court Rules, feeling that to do otherwise would work injustice in a case where costs were assessed to a trustee who had allowed suit to be brought in his name.

Mississippi Power & Light Co. v. Town of Coldwater, 234 Miss. 615, 648, 112 So. 2d 222, 224 (1959). Where the clerk in the lower court had omitted in the transcript a statement of costs accruing to the reporter for transcribing the record, the Court may properly suspend Rule 19 under authority of Rule 33 and allow these costs to be added to the costs awarded at the trial.

Carter v. Berry, 243 Miss. 321, 379, 142 So. 2d 13 (1962). Where a suggestion of error has been filed and has had thorough consideration by the Court, Rule 33 will not authorize the Court to depart from its long standing rule of not hearing a second suggestion of error.

RULE 34. FELONY CASES, WHERE APPELLANT IS ON BAIL. After the submission of a felony case in which appellant is on bail, the Court will, by special order, fix the day for the rendition of its judgment. On the day so fixed, the appellant must appear before the Court to receive judgment, unless he shall have surrendered himself to the Sheriff of the County in which the court rendering the judgment appealed from was held.

RULE 35. (a) The Court sittings for the hearing of the arguments will be held on the First, Second, Third, and Fourth Mondays of each month, beginning with the Second Monday in September and ending with the Second Monday in June, and will also be held on such other days as the Chief Justice may designate, and sittings on any Monday may be dispensed with, or sittings on the Fifth Monday of the month may be had, by direction of the Chief Justice.

(b) For the convenient dispatch of business the Court will ordi-

narily sit in groups of five Judges. The Chief Justice shall be the Presiding Judge of one group and the Presiding Judge of the other group shall be the Judge thereof who has been for the longest time continuously a Member of the Court, and in the event no Judge of a group has been continuously a Member of the Court for a longer time than the others, the Court shall designate by an order entered upon the minutes when sitting en banc which of said Judges shall be the Presiding Justice thereof. In the absence of the Presiding Judge, the Judge of the group who has been for the longest time continuously a Member of the Court shall be the Acting Presiding Judge thereof; and in the event two Judges of a group other than the Presiding Justice thereof shall have had the same period of continuous service, the Court shall designate by order entered upon its minutes, when sitting en banc, which of said Judges shall preside in the absence of the Presiding Judge.

(c) The Chief Justice and the Presiding Justice shall ordinarily sit and preside during alternate weeks, and the minutes of a group shall be signed by the Judge thereof then presiding. The other four members of the group shall be selected from the remaining Judges of the Court by the Chief Justice.

(d) The Court may sit en banc on any day of a term without previous notice thereof being given; but when a case is ordered to be argued before the Court en banc, the Clerk, at least one week before the day set for hearing, shall mail a notice thereof to each lawyer or firm of lawyers interested therein.

(e) In the event any Judge of the Court within fifteen (15) days after a judgment has been rendered, or an order entered by any group, or while a suggestion of error therein is pending, shall certify in writing filed with the Clerk that in his opinion such order or judgment is in conflict with a prior decision of the Court, or of any group thereof, the order or judgment shall be set aside by order entered on the minutes of the first session of either group thereafter; and the Chief Justice shall cause the full Court, or a quorum thereof, to assemble in a conference at a convenient time for the decision of the case, and the judgment agreed on shall be entered at any sitting of any group of the Court.

(f) In case of the absence or disability of the Chief Justice his duties shall be performed by the Presiding Judge.

RULE 36. On the first day of each term of court the Clerk shall prepare in duplicate and deliver to the Chief Justice a list of all criminal cases wherein final judgment has been stayed pending application to the Supreme Court of the United States for a writ of certiorari. The list

shall show the date this Court entered final judgment, date of application for writ of certiorari, and the status of the case.

ORDER

It is ordered that the foregoing rules of this court be adopted this day and shall be effective and govern all cases hereafter heard by this court beginning with those to be set for the First Monday of March, 1965. These rules shall be cited as "Miss. Rules."

RULE 37. COUNSEL FOR INDIGENT APPELLANTS IN CRIMINAL CASES; ISSUES OF FACT ARISING OUT OF APPEALS.

(a) Where an appeal is taken to the Supreme Court by a person convicted of a felony, and he is not represented by an attorney, and the existing record does not disclose whether appellant intelligently and competently waived the appointment of an attorney in this Court, the Court may request the trial court or the trial judge in vacation to determine (1) whether appellant is indigent and unable to employ counsel; (2) if indigent, whether he desires counsel to be appointed for him; and (3) if he does not desire counsel, whether he intelligently and competently waives the appointment of counsel on appeal in the Supreme Court.

A transcript shall be made by the court reporter of the hearing on these issues before the trial court or trial judge in vacation, and such transcript and the order of the trial court or trial judge shall be certified to this Court and shall be made a part of the record on appeal. If the trial judge or this Court determines that appellant is indigent and is entitled to the appointment of counsel on appeal, and that he has not intelligently and competently waived the same, the trial court or trial judge in vacation shall appoint counsel to represent appellant on his appeal in accordance wtih the provisions of Mississippi Laws of 1964, chapter 357. This rule is promulgated in aid of the constitutional appellate Jurisdiction of the Supreme Court and pursuant to the provisions of Mississippi Code Annotated section 1960 (1956).

(b) In the event this Court so directs, the trial court or trial judge in vacation may determine all issues of fact which may arise out of any appeal submitted to the trial court or judge for its or his determination, and which may be necessary for the disposition of cases on appeal to the Supreme Court, in accordance with the authority vested in this Court by Mississippi Code Annotated section 1960 (1956). Such hearing shall be conducted in the manner set out in subsection (a) above.

ORDER

IT IS HEREBY ORDERED that, effective this date, February 16, 1965, the following rule of the Supreme Court of Mississippi be and it is hereby promulgated and adopted as a rule of this Court.

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STUDENT COMMENTS

A LOOK AT CERTAIN AREAS OF LIFE INSURANCE LAW IN MISSISSIPPI

I. Introduction

It is the writer's intention to discuss briefly certain areas of life insurance law as construed by the Mississippi Court. It should be noted that the court in each case must construe the terminology of the particular policy in question. While the insurance companies have similar standard provisions in their policies, the terminology employed by the various companies may vary the limitations of such provisions. Changes in policy provisions prompted by competition, mortality experience, the legislature, company policy, unfavorable construction of the provisions by the courts, or other reasons make it necessary to look to the terminology of each policy in order to determine the liability of the company. The tremendous growth of the life insurance industry may indicate the influence of the above mentioned factors in effecting changes in policy provisions.

Life insurance protection of all kinds in the United States grew to more than $785 billion by the end of 1963 with $730.6 billion of the total being in force with legal reserve life insurance companies.[1] Other life insurance was with fraternal benefit societies, savings banks, assessment and other organizations, and the veterans insurance programs of the government.[2] The number of life insurance companies in business and domiciled in the United States has more than tripled since the end of World War II, and reached a total of 1,507 at the end of 1963.[3] The total insurance in force in Mississippi at the end of 1963 was $4,447,000,000 with $1,137,000,000 group life; $270,000,000 industrial; $537,000,000 credit life; and $2,503,000,000 ordinary life.[4] Death benefit payments in Mississippi for the year 1963 amounted to $27,500,000,[5] an increase from $26,900,000 in 1962.[6] Other benefit payments in 1962 were $4,100,000 matured endowments; $1,100,000 disability payments; $1,800,000 annuity payments; $8,000,000 surrender values; and $6,600,000 policy dividends.[7]

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[1]Institute of Life Insurance, Life Insurance Fact Book 1964, at 5.
[2]*Ibid.*
[3]*Id.* at 98.
[4]*Id.* at 16.
[5]*Id.* at 41.
[6]*Id.* at 47.
[7]*Ibid.*

II. Insurable Interest

A life policy may be taken out on the life of another person if there is an insurable interest in that life. An insurable interest in the life of another person means that there must be a reasonable ground based on the relation of the parties to each other, either pecuniary, blood, or affinity, to expect some advantage from the continuance of the life of the insured.[8] However, if there is no insurable interest at the time the policy is issued, the policy is void as being against public policy.[9] The grounds for the public policy are to prevent wagering[10] and to deter homicide.[11] If the person who takes out the policy has an insurable interest in the insured when the policy is issued, it is not necessary for this interest to continue.[12] Subsequent lack of insurable interest does not invalidate the policy.[13]

Every person has an insurable interest in his own life.[14] When the insured takes out a policy on his own life, there is no public policy which requires the named beneficiary to have an insurable interest in the insured; therefore, the insured may make the proceeds payable to anyone he may select.[15] The insured may also assign the policy to one who has no insurable interest.[16] However, if the beneficiary induces the insured to procure a policy for the purpose of enabling the beneficiary to effect insurance on a life in which he has no insurable interest, and to thereby evade the law against speculation or wagering insurance, the policy is invalid.[17] The court has said that in such a case, the question is one of the good faith and motive behind the procurement.[18] The validity of the policy in a case where the beneficiary has no insurable interest in the insured at the time the policy is issued may turn on the determination of whether the insured or the beneficiary procured the policy. When the evidence as to who took out the policy is in direct conflict, it is properly submitted to the jury for determination.[19]

A company may have an insurable interest in one of its executive

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[8]Gerard v. Metropolitan Life Ins. Co., 167 Miss. 207, 211, 149 So. 793, 794 (1933).

[9]See Murphy v. Red, 64 Miss. 614, 618-19, 1 So. 761, 762 (1887).

[10]National Life & Acc. Ins. Co. v. Ball, 157 Miss. 163, 166, 127 So. 268 (1930).

[11]See Gerard v. Metropolitan Life Ins. Co., 167 Miss. 207, 211, 149 So. 793, 794 (1933).

[12]First-Columbus Nat'l Bank v. Pate Lumber Co., 163 Miss. 691, 141 So. 767 (1932).

[13]Murphy v. Red, 64 Miss. 614, 619, 1 So. 761, 763 (1887).

[14]Davis v. Gulf States Life Ins. Co., 168 Miss. 161, 151 So. 167 (1933).

[15]Van Zandt v. Morris, 196 Miss. 374, 17 So. 2d 435 (1944); Davis v. Gulf States Life Ins. Co., 168 Miss. 161, 168, 151 So. 167, 169 (1933).

[16]Murphy v. Red, 64 Miss. 614, 1 So. 761 (1887).

[17]Davis v. Gulf Life Ins. Co., 168 Miss. 161, 169, 151 So. 167, 169 (1933).

[18]*Id.* at 169, 151 So. at 169.

[19]See *Id.* at 169, 151 So. at 169.

officers,[20] a partner in the life of a member of the partnership,[21] and a creditor in the life of a debtor.[22] The custom of employers to provide burial expenses in case of death was held in one case to be sufficient as a foundation for the employer to have an insurable interest in his employees. The court stated that if the custom is not followed, the insurer may raise the question of lack of insurable interest.[23] It must be noted, however, that the insurer was not a party to the suit, and the lack of insurable interest can only be raised by the insurer.[24] The Mississippi Supreme Court held that a policy taken out by a son-in-law who, under the facts of the case, had no reasonable ground to expect some benefit or advantage from the continuance of life of his mother-in-law was void.[25]

III. Beneficiary of Life Insurance Policy

A. Interest of Beneficiary in the Policy

The beneficiary has a vested interest in a life insurance policy after its delivery of which he can not be deprived without his consent, in the absence of a provision therefor in the policy.[26] But it is settled that where the right to change the beneficiary is reserved, the beneficiary does not take a vested interest until the insured dies,[27] unless there has been a prior gift of the policy to the beneficiary.[28] Where the right to change the beneficiary was reserved, the court stated that "the original beneficiary had no vested right, but only an inchoate imperfect and ambulatory right prior to insured's death."[29]

However, the beneficiary has the right to pay premiums on the policy in order to keep the contract alive after the discontinuance of premium payments by the insured even though the right to change the beneficiary is reserved.[30] In a case where the insured was hospitalized and unconscious, the beneficiary inquired of the insurance company as to the status of premium payments. The court held that the insurer's refusal to disclose to the beneficiary that the premium due had not been paid estopped the insurance company from insisting on a forfeiture as pro-

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[20]First-Columbus Nat'l Bank v. Pate Lumber Co., 163 Miss. 691, 141 So. 767 (1933).

[21]See Bolden v. Gatewood, 164 So. 2d 721 (Miss. 1964).

[22]See Murphy v. Red, 64 Miss. 614, 619, 1 So. 761, 762 (1887).

[23]Neely v. Pigford, 181 Miss. 306, 314, 178 So. 913, 914 (1938).

[24]*Ibid.*

[25]National Life & Acc. Ins. Co. v. Ball, 157 Miss. 163, 127 So. 268 (1930).

[26]First-Columbus Nat'l Bank v. Pate Lumber Co., 163 Miss. 691, 703, 141 So. 767, 768 (1932).

[27]American Life Ins. Co. v. Hauer, 218 Miss. 560, 565, 67 So. 2d 523, 525 (1953).

[28]Stepson v. Brand, 213 Miss. 826, 58 So. 2d 18 (1952).

[29]Faulkner v. Faulkner, 192 Miss. 358, 365, 5 So. 2d 421, 422 (1942).

[30]American Life Ins. Co. v. Hauer, 218 Miss. 560, 67 So. 2d 523 (1953).

vided in the policy.[31]

Where the right to change the beneficiary is reserved, the insured, if he is the owner of the policy, may, without the consent of the beneficiary, pledge the policy as collateral security for a loan,[32] assign the policy,[33] or change the beneficiary.[34] In *Lamar Life Ins. Co. v. Moody*,[35] counsel relied on the cases cited in the opinion as authority for the proposition that when a policy is taken out for the benefit of another, the beneficiary is vested with the absolute ownership, and the insured cannot assign, transfer, or deposit it as collateral security without the consent of the beneficiary. The court distinguished these cases on the grounds that the insured did not reserve the right to change the beneficiary.

B. Endorsement of Change of Beneficiary on the Policy

The provision in life policies that a change of beneficiary be endorsed on the policy has been construed by the court as a provision for the benefit of the insurer which may be waived by the company.[36] Payment of the proceeds by the company into court has been deemed a waiver of this provision.[37] The intended beneficiary has been held entitled to the proceeds where the insured met all the requirements for a change of beneficiary although the change of beneficiary was not endorsed on the policy by the company.[38] The intended beneficiary is also entitled to the proceeds where the insured has done all within his power to effect a change of beneficiary except to return the policy which was wrongfully prevented by a previously named beneficiary.[39] One writer has suggested that such cases do not mean that an insurer, by its payment of the proceeds into court after the death of the insurer, could take away any rights of the original beneficiary and give them to the new beneficiary. He suggests that the court may be holding that substantial compliance with the provision will suffice unless strict compliance is necessary to protect the insurer or to award the proceeds to the claimant who merits the proceeds.[40]

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[31] *Ibid.*

[32] Lamar Life Ins. Co. v. Moody, 122 Miss. 99, 84 So. 135 (1920).

[33] Bank of Belzoni v. Hodges, 132 Miss. 238, 96 So. 97 (1923). See generally 22 Miss. L.J. 175 (1951).

[34] Faulkner v. Faulkner, 192 Miss. 358, 5 So. 2d 421 (1942).

[35] 122 Miss. 99, 84 So. 135 (1920).

[36] Gayden v. Kirk, 207 Miss. 861, 43 So. 2d 568 (1949); Bank of Belzoni v. Hodges, 132 Miss. 238, 96 So. 97 (1923).

[37] Gayden v. Kirk, 207 Miss. 861, 43 So. 2d 568 (1949); Faulkner v. Faulkner, 192 Miss. 358, 5 So. 2d 421 (1942); Bank of Belzoni v. Hodges, 132 Miss. 238, 96 So. 97 (1923).

[38] See Faulkner v. Faulkner, 192 Miss. 358, 365, 5 So. 2d 421, 422 (1942).

[39] Gayden v. Kirk, 207 Miss. 861, 867, 43 So. 2d 568, 570 (1949).

[40] Vance, Insurance § 109 p. 688-90 (3d ed. 1951).

A provision that the request for a change in beneficiary be in writing was held to be for the benefit of the insurance company, and payment of the proceeds into court was ample proof of the waiver.[41] Here, the question before the court was whether or not there could be a valid parol gift of an insurance policy, which by its terms reserved to the insured the right to change the beneficiary.[42] The court stated, "the power . . . to change the beneficiary was itself subject to waiver and could itself become the subject of a gift,"[43] and held that a policy of life insurance such as the one in this case might be the subject of a valid parol gift, provided that all of the essential elements of a gift were present.[44] The court cautioned, however, that proof of gift in cases such as this should be clear and convincing.[45]

C. Simultaneous Death of Beneficiary

Where there is no vested interest until the insured dies, there may be the question as to what happens when both the beneficiary and the insured die without proof as to who died first. The court, in a 1926 case, held that there is no presumption that either of the parties survived the other, and in the absence of proof, all died at the same moment.[46] In this case the policy provision stated, "if any beneficiary shall die before the insured, the interest of such beneficiary shall vest in the insured." The court held that the survival of the beneficiaries was a condition precedent to the vesting of the interest in them and placed the burden of proof upon the heirs of the beneficiaries to establish the condition precedent. In 1956, the legislature passed the Uniform Simultaneous Death Act[47] which provides that if there is insufficient evidence that the insured and the beneficiary have died otherwise than simultaneously, the proceeds shall be distributed as if the insured survived the beneficiary;[48] however, this section does not apply where provisions of the contract are different from the provisions of the act.[49] In an earlier case, the terms of a contract provided that the death claim would not mature until receipt of the proof of death, and further provided that if the beneficiary died before the insurer received the proof of death, the policy would be paid as if the beneficiary had predeceased the insured. Although the beneficiary survived the insured by one-half hour, the court

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[41]Stepson v. Brand, 213 Miss. 826, 834-35, 58 So. 2d 18, 21 (1952). See generally 25 MISS. L.J. 72 (1953).

[42]*Id.* at 832, 58 So. 2d at 20.

[43]*Id.* at 835, 58 So. 2d at 21.

[44]*Id.* at 834, 58 So. 2d at 21.

[45]*Id.* at 835, 58 So. 2d at 22.

[46]Fleming v. Grimes, 142 Miss. 522, 530, 107 So. 420, 421 (1926).

[47]MISS. CODE ANN. §§ 479-01-11 (1956).

[48]MISS. CODE ANN. § 479-04 (1956).

[49]MISS. CODE ANN. § 479-06 (1956).

held that the administrator of the insured was entitled to the insurance proceeds.[50]

D. Death of Insured "Willfully" Caused By Beneficiary

The beneficiary is precluded, by force of public policy, from receiving the insurance proceeds when he "willfully" and without justification in law causes the death of the insured,[51] even though there is no statute which specifically precludes the beneficiary, in such a case, from recovering the proceeds of the policy.[52] A jury's acquittal of the beneficiary in a criminal prosecution is properly disregarded in a civil suit to determine whether or not the beneficiary "willfully" and without justification in law caused the death of the insured.[53]

IV. Double Indemnity

The court, in construing the terms of the double indemnity provisions which are found in many life policies, has adopted the construction given to the terms of an accident policy in the leading case in Mississippi, *United States Fid. & Guar. Co. v. Hood*,[54] which laid down the rule that:

> [*I*]*f the accident is the proximate cause* of the death and sets in motion or starts a latent or dormant disease, and such disease merely contributes to the death after being so precipitated by the accident, it [the disease] is not the proximate cause of the death nor a contributing cause within the meaning of the terms of the policy.[55] (Emphasis added.)

The court has consistently followed this construction.[56]

A distinction has been made by the court where the insured is suffering from an *active* disease, rather than a latent or dormant one, at the time of the injury from which the insured might die at any time.[57]

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[50]Mabon v. White, 202 Miss. 305, 32 So. 2d 191 (1947).

[51]Gholson v. Smith, 210 Miss. 28, 48 So. 2d 603 (1950). See generally Lipscomb, *Insurer's Liability and Rights When Insured's Death is Caused By Beneficiary or Assignee*, 8 Miss. L.J. 476 (1936); 22 Miss. L.J. 247 (1951).

[52]*Ibid.*

[53]See *Ibid.*

[54]124 Miss. 548, 87 So. 115 (1920).

[55]*Id.* at 572, 87 So. at 119.

[56]New York Life Ins. Co. v. Schlatter, 203 F.2d 184 (5th Cir. 1953); United States Fid. & Guar. Co. v. Smith, 164 So. 2d 462, 469 (Miss. 1964); Mutual Life Ins. Co. v. Smith, 160 So. 2d 203 (Miss. 1964); Standard Life Ins. Co. v. Foster, 210 Miss. 242, 49 So. 2d 391 (1950); Metropolitan Life Ins. Co. v. Williams, 180 Miss. 894, 178 So. 447 (1938). See Equitable Life Assur. Soc'y of the United States v. Askew, 194 Miss. 347, 353, 11 So. 2d 441, 442 (1943).

[57]See United States Fid. & Guar. Co. v. Smith, 164 So. 2d 462 (Miss. 1964);

If the burden of proof is met[58] by showing that the accident is a proximate cause of death and sets in motion a train of events leading directly to death, "then the death results from the accident. This is true even though the state of health of the insured is delicate so that he is killed by injuries that probably would not have been fatal to one in normal health."[59]

The burden of proving that the death of the insured results from accidental causes within the meaning of the policy is generally placed by the terms of the policy upon the party asserting the claim against the insurance company.[60] It is not essential that the fact that the injury was caused by accidental means be proved by direct evidence.[61] Where the fact of injury has been clearly shown, the means by which the injury was caused may be proved by circumstances, including the nature of the injury itself.[62] The jury is only required to believe from a preponderance of all the evidence that the injury was produced by accidental means.[63] The court has indicated it will recognize the distinction between accidental death and death resulting from accidental means.[64] However, one writer has suggested that although most courts still insist that there is a difference between coverage of death by "accident" and death by "accidental means," the majority of these cases were decided many years ago, and in recent years a large number of courts have denied that there is any substantial difference in coverage of the policy, whether the policy provided for "accidental means" or merely "accident."[65]

Where the issue was whether the injuries causing the death were effected by accidental means or by a suicidal act of the insured, the court stated:

Mutual of Omaha Ins. Co. v. Deposit Guar. Bank & Trust Co., 246 Miss. 640, 648, 151 So. 2d 816, 819-20 (1963); Equitable Life Assur. Soc'y of the United States v. Askew, 194 Miss. 347, 353, 11 So. 2d 441, 442 (1943); United States Fid. & Guar. Co. v. Hood, 124 Miss. 548, 575, 87 So. 115, 120 (1920).

[58]See United States Fid. & Guar. Co. v. Smith, 164 So. 2d 462, 466-67 (Miss. 1964); Mutual of Omaha Ins. Co. v. Deposit Guar. Bank & Trust Co., 246 Miss. 640, 647, 151 So. 2d 816, 819 (1963); Equitable Life Assur. Soc'y of the United States v. Askew, 194 Miss. 347, 353, 11 So. 2d 441, 441-42 (1943).

[59]United States Fid. & Guar. Co. v. Smith, 164 So. 2d 462, 470 (Miss. 1964).

[60]See *e.g.*, Jefferson Standard Life Ins. Co. v. Jefcoats, 164 Miss. 659, 143 So. 842 (1932).

[61]Mutual Life Ins. Co. v. Rather, 221 Miss. 527, 537, 73 So. 2d 163, 166 (1954); Metropolitan Life Ins. Co. v. Williams, 180 Miss. 894, 908, 178 So. 477, 479 (1938). See Continental Cas. Co. v. Daniels, 173 So. 302 (Miss. 1937).

[62]*Ibid.*

[63]Metropolitan Life Ins. Co. v. Williams, 180 Miss. 894, 910, 178 So. 477, 480 (1938).

[64]Lavender v. Volunteer State Life Ins. Co., 171 Miss. 169, 183, 157 So. 101, 104 (1934).

[65]VANCE, INSURANCE § 181, at 949-50 (3d ed. 1951) (While this section is on accident insurance, the terminology of accident policies and of double indemnity provisions in life policies are often similar.)

> [T]he law indulges in a presumption against suicide, and by the aid of this presumption, the plaintiff makes a prima facie case, sufficient to go to the jury, by showing that the death was occasioned by a bodily injury effected through external and violent means, without showing by direct evidence that the same was effected through accidental means. Where, however, the evidence is conflicting, the presumption against suicide is not sufficient to place upon the defendant the burden of showing that the injuries were inflicted with suicidal intent. On the contrary, the burden is upon the plaintiff throughout, assisted by the presumption just referred to, to establish by a preponderance of all the evidence that the injuries were effected through accidental means, and were not self-inflicted.[66]

V. Suicide

A. General

The liability of the insurance company on the policy is generally limited to a refund of the premium paid if the death of the insured occurs within a specified period of time, usually a one or two year period after the issue date of the policy, as a result of suicide. Suicide is also generally excepted from the risks assumed under the double indemnity provision.

B. Burden of Proof

The burden of proof is upon the insurance company to establish by the preponderance of the evidence that the death of the insured was caused by suicide within the specified period of time before it can avoid liability on the policy.[67] However, the burden of proof is upon the claimant to establish that the cause of death is within the risks assumed by the double indemnity provision.[68] The presumption of law is against suicide, but the presumption is not conclusive; it is only prima facie and may be overcome by the evidence.[69]

C. Sanity of the Insured

The court, in order to make an analogy to the question which was before it, made note of the general rule:

> It was generally held by the courts that a stipulation in a policy by which the insurance company was not to be liable if the insured committed suicide relieved the company from inten-

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[66]Jefferson Standard Life Ins. Co. v. Jefcoats, 164 Miss. 659, 673, 143 So. 842, 845 (1932).

[67]See *Id.* at 672, 143 So. at 844.

[68]*Id.* at 672, 143 So. at 844.

[69]Life & Cas. Ins. Co. v. Andrews, 149 Miss. 306, 318, 115 So. 548, 551 (1928). See Jefferson Standard Life Ins. Co. v. Jefcoats, 164 Miss. 659, 671, 143 So. 842, 844 (1932).

> tional self-destruction by the insured, but did not relieve it from liability for unintentional self-destruction; and they held under such a stipulation that, where the insured committed suicide while insane, it was an unintentional self-destruction and the company was liable. . . . These decisions of the courts were followed by a suicide clause in the policies of some life insurance companies, providing, . . . that the death of the insured by self-destruction[,] "sane or insane," should avoid the policy. Under that stipulation the courts have generally held that self-destruction avoided the policy, whether the insured was sane or insane.[70]

VI. Incontestable Clause

A. General

A modern provision in life policies provides that the policy shall be incontestable after it has been in force *during the lifetime* of the insured for a specified period of time from its date of issue.[71] The effect of an incontestable provision has been held to prevent the insurer from questioning the validity of the contract in its inception or from contending that it has thereafter become invalid by reason of a condition broken.[72] The court has found no conflict between an incontestable provision and a contract provision for misstatement of age.[73] Also, an incontestable clause does not relieve the insured from proving that the relief sought by him, after the expiration of the period of time stated in the incontestable clause, is within the promises made by the insurance company in the policies.[74]

B. Death Within the Contestable Period

The court construed a modern incontestable provision in a suit where the death of the insured resulted from suicide within the contestable period. The suit was delayed by the beneficiary and brought after the expiration of the specified period of time stated in the incontestable clause. The court held that the incontestable provision had no application since the policy had not been in force for the specified period of time *during the lifetime of the insured;* thus, the insurance company

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[70]Sovereign Camp, W.O.W. v. Hunt, 98 So. 62, 63, 136 Miss. 156 (1923) (error in printing in Mississippi Reports). See Great So. Life Ins. Co. v. Campbell, 148 Miss. 173, 178, 114 So. 262, 263 (1927).

[71]See, *e.g.*, Vance v. Life & Cas. Ins. Co., 184 Miss. 604, 608, 186 So. 647 (1939). See generally Vance, Insurance § 97, at 591-92 (3d ed. 1951).

[72]Vance v. Life & Cas. Ins. Co., 184 Miss. 604, 609-10, 186 So. 647, 648 (1939); Messina v. New York Life Ins. Co., 173 Miss. 378, 388, 161 So. 462, 463 (1935).

[73]Messina v. New York Life Ins. Co., 173 Miss. 378, 161 So. 462 (1935).

[74]See, *e.g.*, New York Life Ins. Co. v. Reedy, 181 Miss. 774, 780, 180 So. 607, 609 (1938).

was not barred by the incontestable clause from asserting its defense under the suicide provision.[75] A distinction has been made between such a clause and one which provides that the policy shall be incontestable except for non-payment of premiums, provided the specified period of time *has elapsed from its date of issue*.[76] The latter clause has been construed as providing that the insurance company can interpose no contest after the specified period of time from the issue date of the policy, and must, therefore, assert its defenses within the contestable period.[77] Here, where the insured dies within the contestable period, the beneficiary may decline to bring suit until after the specified period of time has elapsed from the issue date of the policy and thereby deprive the insurance company of a defense good at law,[78] unless a contest is instituted by the insurer within the period[79] or a release procured from the beneficiary.[80] The company may institute suit seeking to cancel the policies in the chancery court invoking the jurisdiction of equity, since special injury could result by the beneficiary's declining to bring suit within the specified period of time.[81] However, under the modern clause, the insurance company could not invoke equity jurisdiction since the incontestable clause is not applicable, and the insurance company will have a valid defense at law when suit is brought by the beneficiary on the policy.[82]

C. Effect Upon Reinstated Life Insurance Policy

When a policy which provided that it would be incontestable after one year (the opinion does not state "from the date of issue") lapsed for non-payment of premiums after the contestable period had run, and the policy was subsequently reinstated, the court held that the reinstatement was governed by the same principles as the original application, and placed the duty on the insurance company to ascertain within one

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[75]Vance v. Life & Cas. Ins. Co., 184 Miss. 604, 186 So. 647 (1939). See generally VANCE, INSURANCE § 97, at 591-92 (3d ed. 1951).

[76]Cotton States Life Ins. Co. v. Cunningham, 141 Miss. 474, 481, 106 So. 766, 767 (1926). See Vance v. Life & Cas. Ins. Co., 184 Miss. 604, 610, 186 So. 647, 648 (1939).

[77]VANCE, INSURANCE § 97, at 591-92 (3d ed. 1951). See Modern Woodmen of America v. Kehoe, 199 Miss. 754, 762, 25 So. 2d 463, 464 (1946). See Cotton States Life Ins. Co. v. Cunningham, 141 Miss. 474, 481-82, 106 So. 766, 767 (1926).

[78]VANCE, INSURANCE § 97, at 591-92 (3d ed. 1951). See Cotton States Life Ins. Co. v. Cunningham, 141 Miss. 474, 481-82, 106 So. 766, 767 (1926).

[79]*Ibid.*

[80]VANCE, INSURANCE § 97, at 591-92 (3d ed. 1951).

[81]See Cotton States Life Ins. Co. v. Cunningham, 141 Miss. 474, 480-82, 106 So. 766, 767 (1926); Williams v. New York Life Ins. Co., 132 Miss. 345, 96 So. 97 (1923).

[82]Cotton States Life Ins. Co. v. Cunningham, 141 Miss. 474, 482, 106 So. 766, 767 (1926).

year whether the statements in the application for reinstatement were true, and to take action if untrue.[83] The import of this decision appears to be that the incontestable clause does not bar the insurance company from contesting the validity of the reinstatement if it does so within the specified time from the date of reinstatement. The court in the subsequent case of *New York Life Ins. Co. v. Burris*[84] stated:

> It seems to us that on reason and authority it must be held that the policy. . . , which had become incontestable before lapse and reinstatement, as to all matters covered in the original application for the policy or contract of insurance will, after revival and reinstatement remain incontestable as to such matters, but as to the contract of reinstatement, the incontestable clause takes effect anew upon reinstatement and for the period prescribed, thereby permitting a contest because of fraud in securing the reinstatement. Any other view would open the door to the grossest deceit and fraud in securing the reinstatement of a policy that has become incontestable under its original provisions.[85]

The Supreme Court of Florida subsequently adopted the construction as given in the *Burris* case.[86]

D. Incontestable Clause v. Violation of the Law Exception

The court, in *Lavender v. Volunteer State Life Ins. Co.*,[87] was confronted with the question of whether the incontestable clause in the policy prevented the insurer from showing non-liability under a *double indemnity provision* which did not cover death resulting from a violation of the law. The contestable period had run. The court adopted the reasoning of an earlier federal court decision[88] which it considered as stating the correct rule and quoted it as follows:

> A provision for incontestability does not have the effect of converting a promise to pay on the happening of a stated contingency into a promise to pay whether such contingency does or does not happen. It cannot properly be said that a party to an instrument contests it by raising the question whether under its terms a liability asserted by another party has or has not accrued.[89]

While the opinion indicates that there was also another separate defense

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[83]Franklin Life Ins. Co. v. Jones, 169 Miss. 91, 152 So. 285 (1934).
[84]174 Miss. 658, 165 So. 116 (1936). See generally 8 Miss. L.J. 510 (1936).
[85]174 Miss. at 671, 165 So. at 120.
[86]Winer v. New York Life Ins. Co., 190 So. 894, 901 (Fla. 1938).
[87]171 Miss. 169, 157 So. 101 (1934).
[88]Sanders v. Jefferson Standard Life Ins. Co., 10 F.2d 143, 144 (5th Cir. 1925).
[89]171 Miss. at 182, 157 So. at 104.

to the double indemnity provision because there was no visible contusion or wound,[90] the court appears to hold that the incontestable clause does not bar the defense of a violation of the law when that risk is not assumed.[91]

Considerable anxiety may have been cast in this area by the decision of *Modern Woodmen of America v. Kehoe*.[92] Here, the question was whether or not the incontestable clause, which the by-laws of the organization expressly made a part of the fraternal life policy, prevented the insurer from relying upon a defense under another clause which provided that the policy would be null and void and of no effect if the insured's death should occur in consequence of any violation of the law. A divided court held that the incontestable clause, after the contestable period had run, barred the fraternity's defense that the insured's death by legal execution was in consequence of a violation of the law. The court stated that the assumption of risk of death by legal execution was not against the public policy of Mississippi.[93] The decision, which cites the *Lavender* case, clearly indicates that risks not assumed or affirmatively excluded, including death resulting from any violation of the law, may be raised by the insurer without regard to the incontestable clause.[94] The court was probably swayed by the provision that a "condition" would render the policy void,[95] by the absence of a specific exclusion of legal execution,[96] and by the fact that the death occurred after the contestable period.[97]

At least it is clear that the incontestable clause will not conflict with a risk not insured by the *double indemnity provision*. The holding, as it applies to the policy may be open to criticism if it is subsequently construed to bar a defense that no risk is assumed for violation of the law in a case where the death results in violation of the law by means other than legal execution.[98] It may be approved if it should be deemed authority for the proposition that the incontestable clause, after the contestable period, will bar a defense that no risk is assumed for violation of the law when death results from legal execution in consequence of a violation of the law, unless legal execution is specifically excepted as a risk not insured.[99]

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[90] *Id.* at 182-83, 157 So. at 104.

[91] See *Id.* at 181, 183, 157 So. at 103-04.

[92] 199 Miss. 754, 25 So. 2d 463 (1946) (concurring opinion) (specially concurring opinion) (dissenting opinion).

[93] *Id.* at 761-62, 25 So. 2d at 463.

[94] *Id.* at 766-67, 25 So. 2d at 465-66.

[95] *Id.* at 767, 25 So. 2d at 466.

[96] See *Id.* at 760-61, 25 So. 2d at 463.

[97] See *Id.* at 761-62, 25 So. 2d at 463-64.

[98] Triplett, *Insurance, The Work of the Mississippi Supreme Court, 1942-46*, 18 Miss. L.J. 58, 62 (1946); 18 Miss. L.J. 476 (1946).

[99] See Vance, Insurance § 96, at 574 & n.14 (3d ed. 1951).

VII. Exemptions

A. Insurance Proceeds Payable to a Named Beneficiary

By virtue of section 308 of the code, the proceeds of a life policy, including cash surrender value to an amount not exceeding $10,000 upon any one life, will inure to the party or parties named as beneficiaries thereof, free from all liability for the debts of the person whose life was insured even though such person paid the premiums thereon.[100] An earlier version of the statute, was construed in a case[101] where the beneficiary took out the policy on her husband and paid the premiums thereon, and the creditors of the beneficiary sought to reach the proceeds. The court held that the exemption does not apply to the beneficiary's creditors.[102] In a suit brought by creditors of the insured, the court stated:

> The law exempts proceeds of insurance policies to the amount of $10,000 payable to any special beneficiary. To this extent, and up to the amount of $10,000, the proceeds cannot be made liable for any debt, even for premiums paid by the insured while he was insolvent, and though paid with the intent to hinder, delay, and defraud his creditors. This amount is made sacred and secure from the grasp of the law, and cannot be made liable in any way for any debt, except it be by consent of the beneficiaries.[103]

However, the proceeds of the insurance in excess of the $10,000 exemption are liable for the premiums paid on the whole insurance, both exempt and non-exempt, by the insured in fraud of the creditor's rights and while insolvent.[104] Where there is no illegal investment in the policies by an insolvent insured, the creditors of the deceased insured can not reach the excess of the exemption from the beneficiary, for it is well settled that a policy of life insurance payable to another is not part of the insured's estate,[105] though it may be so considered for estate tax purposes.[106]

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[100]Miss. Code Ann. § 308 (1956).

[101]Yale v. McLaurin, 66 Miss. 461, 5 So. 689 (1889).

[102]*Ibid.*

[103]Johnson v. Bacon, 92 Miss. 156, 164, 45 So. 858, 859 (1908). *Contra,* Cozine v. Grimes, 76 Miss. 294, 300, 24 So. 197, 198 (1898). The Cozine case implies a savings to creditors of the right to recover where the insolvent insured pays the premium, relying on Jones v. Patty, 73 Miss. 179, 18 So. 794 (1896) where the question was not presented to the court.

[104]Johnson v. Bacon, 92 Miss. 156, 164-65, 45 So. 858, 859 (1908).

[105]See Jones v. Patty, 73 Miss. 179, 185, 18 So. 794, 795 (1896).

[106]See Comment, 34 Miss. L.J. 81, 92 (1962).

B. Insurance Proceeds Payable to the Estate of the Insured

Section 309 provides:

> The proceeds of a life insurance policy not exceeding five thousand dollars payable to the executor, or administrator, of the insured, shall inure to the heirs or legatees, freed from all liability for the debts of the decedent, except premiums paid on the policy by any one other than the insured for debts due for expenses of last illness and for burial; but if the life of the deceased be insured for the benefit of his heirs or legatees at the time of his death *otherwise,* and they shall collect the same, the sum collected shall be deducted from the five thousand dollars and the excess of the latter only shall be exempt. But no fee shall be paid or allowed by the court to the executor or administrator for handling same.[107] (Emphasis added.)

The two purposes of the section are to exclude all general creditors of the decedent from participating in the proceeds of life insurance not exceeding $5,000 for the benefit of the heirs and legatees, and to insure the payments of debts excepted from the exemption to the extent of the proceeds of the policy.[108] The creditors excepted from this statute should first resort to the general estate for payment of debts and then to the proceeds of the policy, only to the extent necessary to enable them to collect their claims against the estate.[109] Also, where litigation is required by the administrator to collect the proceeds of the insurance policies, the amount of which will exceed the amount of the exemption, the attorneys' fees should be paid first out of the non-exempt insurance proceeds, if there is no other estate, and only then out of the $5,000 exemption.[110]

The amount of insurance policies for proceeds less than $5,000 is prima facie exempt property, forming no part of the estate to be administered by the personal representative, which inures to the benefit of, and descends to, the heirs giving them the right to bring suit against the insurance company for the proceeds.[111]

The benefit of section 309 inures to the benefit of a legatee of the will of the deceased insured.[112] Section 309 also protects the cash surrender value of the policy, on the life of the insured while he is living, from the trustee in bankruptcy.[113]

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[107]Miss. Code Ann. § 309 (1956).

[108]Delta Ins. & Realty Co. v. Benjamin, 122 Miss. 275, 287, 84 So. 226, 227 (1920).

[109]See *Id.* at 287-88, 84 So. at 227.

[110]Abernethy v. Savage, 159 Miss. 506, 132 So. 553 (1931).

[111]See Equitable Life Assur. Soc'y of the United States v. Hartfield, 87 Miss. 548, 40 So. 21 (1906).

[112]Coates v. Worthy, 72 Miss. 575, 17 So. 606 (1895).

[113]Dreyfus v. Barton, 98 Miss. 758, 54 So. 254 (1911).

C. Effect of Section 308 on Section 309

The amount of the insurance proceeds payable to, and received by, a named beneficiary, who is also an heir or legatee of the insured, may determine whether and to what extent the beneficiary is entitled to share in the insurance proceeds, payable to the insured's executor or administrator, which may be exempt from creditor's claims under section 309.

The operation of sections 308 and 309 were considered in *Cozine v. Grimes*,[114] where the insured died intestate leaving as his only heirs, one child and a widow. There were three policies in force on his life, one for $3,000 naming his wife as beneficiary and two in the amount of $5,000 payable to his executor or legal representative. The administrator reported that the $5,000 insurance proceeds, which he believed to be exempt from creditors, were all the property he had in his hands. The court, in determining the amount exempt under section 309, held that the exemptions under sections 308 and 309 were not cumulative. Thus, the insurance payable "otherwise" referred to in section 309 included insurance proceeds exempted under section 308. When there is no insurance payable "otherwise," the sum of $5,000, if payable to the executor or administrator, is the maximum amount set apart as exempt for the heirs or legatees. Hence, the effect of section 309 is to give each heir or legatee an amount which, together with the proceeds already received "otherwise," would be equal to his pro rata share of the $5,000 exemption. As there were only two heirs, each heir's pro rata share of the $5,000 exemption was $2,500. The distribution was made as follows: The widow, having $3,000 insurance "otherwise" as a named beneficiary, was entitled to none before creditors, as no amount was required to be added to her insurance "otherwise" to make it equal to her pro rata share of the $5,000 exemption. The child, having no insurance "otherwise," was entitled to $2,500, his pro rata share of the $5,000 exemption. The excess over the $2,500 was to be used in the payment of creditors of the decedent, and *the balance* would be *divided* according to the statute of descent and distribution, equally between the two heirs, the wife and child.[115]

This decision was followed in the case of *Magee v. Bank of Hattiesburg & Trust Co.*,[116] where the deceased insured died insolvent and testate, his will leaving all of his property to his wife and children. The claim that the will operated to change the beneficiary was rejected. His life was insured in the amount of $10,768.15, and payable under the various policies to named beneficiaries as follows: $2,505.16 to his widow,

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[114]76 Miss. 294, 24 So. 197 (1898).

[115]*Id.* at 299, 24 So. at 198.

[116]134 Miss. 126, 98 So. 541 (1923).

$1,426.15 payable equally to two of his daughters, and $6,836.84 to executors, administrators, and assigns. A third daughter was not a beneficiary in any policy and received nothing from insurance. The pro rata share of each of the four heirs or legatees of the $5,000 exemption was $1,250. The widow, having $2,505.16 of insurance otherwise, had received more than her pro rata share of $5,000 and was entitled to none until the creditors were satisfied. The two daughters who each received $713.07 of insurance otherwise were entitled to receive $536.93 each from the insurance money in the hands of the administrator to make up their pro rata share of $1,250. The third daughter who was not otherwise provided for by insurance was entitled to have her full pro rata share of $1,250. The excess was directed to be used in payment of creditors with the balance, if any, to be distributed under the terms of the will.

D. Effect of Section 333 on Sections 308 and 309

Section 309 has been construed in light of section 333 which provides: "The exemptions in this chapter shall be allowed in favor of residents of this state only."[117] The exemption applies to policy proceeds of an *insured resident*, which inures to the benefit of resident and non-resident heirs and legatees alike.[118] It was suggested that if a non-resident insured had made his will in Mississippi bequeathing life insurance to residents, there would be no exemptions under the Mississippi Code against his creditors and only for the reason that he was a non-resident.[119] Thus, it would be necessary to look to the exemption law of the place of the insured's residence.

E. State Inheritance Tax

In determining the value of the gross estate of a decedent for inheritance tax purposes, the insurance proceeds of policies upon the life of the decedent, of which the decedent possessed at his death any of the incidents of ownership, are includible in the gross estate to the extent of the *excess* of twenty thousand dollars ($20,000) receivable by all beneficiaries other than the executor of the estate. The proceeds received by the executor on the life of the decedent are includible.[120]

F. State Income Tax—Gross Income

The term "gross-income" does not include the following items, which shall be exempt from taxation hereunder:

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[117]Miss. Code Ann. § 333 (1956).

[118]Borodofski v. Feld, 88 Miss. 31, 40 So. 816 (1906).

[119]See *Ibid.*

[120]Miss. Code Ann. § 9262-04 (Supp. 1962).

(1) The proceeds of life insurance policies and contracts paid upon the death of the insured. However, the income from the proceeds of such policies or contracts shall be included in the gross income.

(2) The amount received by the insured as a return of premium or premiums paid by him under life insurance policies, endowment or annuity contracts, either during the term or at maturity or upon surrender of the contract.[121]

G. Other Exemptions and Advantages

1. *General*

Section 101 (a) provides for full exclusion of *most* life insurance proceeds paid by reason of the death of the insured from federal income tax.[122] Also the policy options offered in the insurance contract allow use of a $1,000 annual federal income tax exclusion on interest income to a surviving spouse.[123] The most practical advantages of life insurance, as an estate planning tool, may be found in the use of the life insurance trust,[124] which has both non-tax[125] and tax[126] advantages. The owner of an insurance policy is entitled to establish the trust, and the owner of the policy may be the insured, the beneficiary, or the purchaser of the policy.[127]

2. *Restraint on Alienation of Policy Proceeds*

If the permission to commute, anticipate, encumber, alienate, or assign the insurance proceeds retained by the insurance company is expressly withheld by the terms of the contract, it shall not be subject to the debts of the person entitled to the proceeds.[128]

To permit the insured to prevent the proceeds from being applied to the debts of his wife and dependents is to give effect to Mississippi's public policy that a person may make provision for his dependents independent of any debts and obligations that they may make.[129]

VIII. Service of Process

A. Foreign Companies Authorized to do Business Within the State

By statute,[130] a foreign insurance company, as a prerequisite to ob-

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[121]Miss. Code Ann. § 9220-08(c) (Supp. 1962).
[122]Int. Rev. Code of 1954, § 101(a).
[123]See generally Comment, 34 Miss. L.J. 81 (1962).
[124]See *Ibid.*
[125]*Id.* at 82.
[126]*Id.* at 85.
[127]*Id.* at 96-97.
[128]Miss. Code Ann. § 5682 (1956).
[129]See Adams v. Strong, 171 Miss. 510, 514-15, 158 So. 204, 205 (1934).
[130]Miss. Code Ann. § 5672 (1956).

taining authorization to do business within the state, must appoint the commissioner of insurance as its attorney upon whom process may be served and file with the commissioner the appointment of a resident as agent, who shall be authorized to acknowledge service of process. The company must consent that service of process on the agent shall be valid as if served on the company. The purpose of the statute is to domesticate foreign insurance companies in this state, as far as suits against them were concerned, so that in that respect they should stand exactly as if they were domestic insurance companies.[131]

Where service of process has been made upon the agent appointed by the foreign insurance company, it has been held that the court will not take judicial notice that the agent has been appointed. Proof that such appointment was made and that process was served on that identical agent must be made,[132] and when service has been made upon this agent, the company can not complain because its agent did not give the company notice.[133] The company waives all claims of error by reason of such service.[134] When service of process is made within the provisions of this section on an insurance company which has complied with this section, service of process is exclusively governed by this section.[135] However, a mere showing of service of summons on the state insurance commissioner has been held insufficient to authorize default judgments against the foreign company authorized and doing business within the state.[136] The court will not take judicial notice that the commissioner was authorized to acknowledge service.[137] It is suggested that a certified copy of the instrument constituting and appointing the commissioner of insurance as its attorney be submitted in the cause. The court has held that a certified copy of the insurance commissioner's appointment is sufficient proof that the company was authorized to do and was doing business within the state.[138] Service of process upon the

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[131]Universal Life Ins. Co. v. Catchings, 169 Miss. 26, 34, 152 So. 817, 819 (1934).

[132]Great So. Life Ins. Co. v. Gomillion, 145 Miss. 314, 326, 110 So. 770, 771 (1927); National Surety Co. v. Bd. of Supervisors, 120 Miss. 706, 83 So. 8 (1919). See generally 6 Miss. L.J. 436 (1934).

[133]Great So. Life Ins. Co. v. Gomillion, 145 Miss. 314, 327-28, 110 So. 770, 772 (1927).

[134]Miss. Code Ann. § 5672 (1956). See generally. Rogers, *Process Sufficient to Require a Defense or Default Judgment*, 30 Miss. L.J. 388, 402, 405 (1959).

[135]Great So. Life Ins. Co. v. Gomillion, 145 Miss. 314, 327, 110 So. 770, 772 (1927).

[136]Continental Cas. Co. v. Gilmer, 146 Miss. 22, 111 So. 741 (1927); Globe Rutgers Fire Ins. Co. v. Sayle, 107 Miss. 169, 65 So. 125 (1914).

[137]Globe Rutgers Fire Ins. Co. v. Sayle, 107 Miss. 169, 180, 65 So. 125, 126 (1914).

[138]Universal Life Ins. Co. v. Catchings, 169 Miss. 26, 33, 152 So. 817, 819 (1934).

insurance commissioner does not subject the foreign insurance companies to the jurisdiction of the state court in controversies growing out of transactions wholly without the state.[139]

The validity of the service of process on the insurance commissioner when he has been appointed attorney is not affected by failure of the commissioner to notify the insurance company,[140] but the commissioner shall be subject to liability on his bond.[141]

Service of process upon the insurance commissioner is an additional method for service of process of all suits brought in the county where the plaintiff resides or the loss occurs, and also in the county where the insurance commissioner resides, provided the plaintiff resides there.[142]

The insurance commissioner's authority as agent for service of process shall be irrevocable as long as any liability, cognizable in the courts, of the company remains outstanding in the state.[143]

B. Foreign Companies Not Authorized to do Business

The legislature has made provision for service of process on foreign companies doing business, but not authorized to do business in the State.[144] The concern of the legislature was that the residents of the State holding policies of insurance *issued* or *delivered* them in this state by non-authorized foreign companies would be presented with the obstacle of resorting to distant forums for the purpose of asserting legal rights under the policies.[145]

If an unauthorized or alien insurer effects by mail or otherwise in this state, (1) the issuance or delivery of contracts of insurance to *residents* of this state or to corporations authorized to do business in this state, (2) the solicitation of applications for such contracts, (3) the collection of premiums or other considerations for such contracts, or (4) any other transaction of insurance business, it is equivalent to and shall constitute an appointment by the insurer of the commissioner of insurance to be its agent upon whom service of process may be served in any proceedings instituted by or in behalf of the insured or beneficiary arising out of any such contract.[146]

Service on the commissioner as provided by statute is sufficient, provided notice of such service and a copy of the process are sent to the

[139]Morris & Co. v. Skandinavia Ins. Co., 161 Miss. 411, 137 So. 110 (1931).

[140]Fidelity & Cas. Co. v. Cross, 127 Miss. 31, 47, 89 So. 780, 781 (1921).

[141]*Ibid.*

[142]See Thompson v. Commonwealth Life Ins. Co., 198 Miss. 515, 519, 23 So. 2d 539, 540 (1945).

[143]Universal Life Ins. Co. v. Catchings, 169 Miss. 26, 34, 152 So. 817, 819 (1934).

[144]Miss. Code Ann. §§ 5705-11, 5705-12, 5705-13, 5705-14 (Supp. 1962).

[145]Miss. Code Ann. § 5705-11 (Supp. 1962).

[146]Miss. Code Ann. § 5705-12 (Supp. 1962).

defendants in compliance with the terms of the statute.[147] Process also may be made if it is served on a person within the State who in this state on behalf of such insurer is soliciting insurance; or collecting or receiving premiums or other considerations for insurance; or making, issuing or delivering any contract of insurance. A copy of such process must be sent to the defendant in compliance with the statute.[148]

IX. Conclusion

Since the legal departments of the life insurance companies draft the terms of the insurance contract leaving the purchaser with no voice as to its terms, the courts, as a general rule, construe the terms of the contract more strongly against the insurance company. It is doubtful that either the average purchaser of insurance or the average agent of an insurance company is well versed in the legal effect of the various legalistic terms. It is usually the agent who sells the policy and explains the coverage afforded by it to the purchaser in terms the purchaser can understand. These terms are necessarily explained as the agent understands them. As the agent is the means usually employed by the insurance companies for the expanding of their businesses, the insurance companies are not without knowledge of the customary relationship between the agent and the purchaser. It is submitted, therefore, that it would not appear to be unjust to construe the terms of the insurance policy according to the general understanding of the purchasing public rather than upon some legal precedent, if there should be a difference between the two. This is not to say that the companies may not limit their liability by the terms of the contract; but should the companies, with knowledge of the customary procedure, permit their agents to assert that the terms have a certain meaning and should the general public accept and rely upon this explanation, then the insurance companies should be estopped from asserting that the terms have a different meaning which may find support in the precedents of case law. The faith and reliance of the general public in the insurance industry is evidenced by the significant amount of insurance purchased by the public since the end of World War II. It would appear that it would be unreasonable to assume that these purchases of insurance were made blindly by purchasers who had no idea of what they purchased. It would be more reasonable to assume that the general public's understanding is that which the insurance industry intended for them to understand. It is submitted that this in itself is sufficient grounds for the general rule that the courts will construe the terms of the policy more favorably toward the insured.

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[147]Miss. Code Ann. § 5705-13 (Supp. 1962).
[148]Miss. Code Ann. § 5705-14 (Supp. 1962).

THE RIGHT TO RECOVER IN TORT FOR EMOTIONAL DISTRESS

I. Introduction

The general purpose of this comment is to review briefly the history of the right to recover for emotional distress and to state the problem facing the courts today when the alleged injury is mental or emotional in nature. Next the writer undertakes to indicate the solutions to this problem as announced by various jurisdictions. The ultimate purpose of the comment is to review the solutions to the problem adopted in Mississippi and make a definitive statement as to the status of the right in this state.

II. Definition

Dean Prosser has indicated that the term "emotional distress" and its equivalents—mental anguish, mental suffering, mental disturbance, and similar expressions commonly found in the opinions—require no definition.[1] It is very doubtful that a comprehensive and perennially valid definition could be derived from the cases. The term is a concept whose meaning is more easily conveyed by examples than by definition. It includes all highly unpleasant mental reactions such as, fright, grief, horror, shame, embarrassment, humiliation, mortification, anger, chagrin, worry, nausea, and disappointment.[2]

III. History

The common law treatment of the right to recover for emotional distress alone can best be expressed by quoting Lord Wensleydale's famous statement, "Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone."[3] Thus it was that the early cases refused any recovery for emotional distress, unless it could be brought within the scope of some already recognized tort.[4] But if some already established tort—such as trespass, assault, battery, or false imprisonment—could be proved, the independent cause of action served as a peg upon which to hang the mental damages.[5] Where an injury to the person or property of the plaintiff was proved, the courts would allow additional compensation for any emotional disturbance inflicted by the same act, but not otherwise. In cases grounded in negligence where the defendant's act directly

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[1]Prosser, *Insult and Outrage*, 44 Calif. L. Rev. 40, 43 (1956).

[2]Restatement, Torts § 46, comment *f* (Supp. 1948). For further examples see 27 Words & Phrases 71-73, 82 (Perm. ed. 1961).

[3]Lynch v. Knight, 9 H. L. Cas. 577, 598, 11 Eng. Rep. 854, 863 (1861).

[4]Note, 9 Miss. L.J. 228, 230 (1936).

[5]Prosser, Torts § 11, at 40 (2d ed. 1955) [hereinafter cited as Prosser].

and immediately caused a physical injury, the courts found no trouble in allowing compensation for purely mental elements of damage accompanying the self-evident physical injury. Such mental elements included fright at the time of the injury, apprehension as to its effects, nervousness, and humiliation from disfigurement.[6] Such recoveries for emotional distress dependent entirely on the showing of an independent tort became known as "parasitic" damages. It was felt that the existence of the objective physical injury and independent cause of action were necessary and sufficient safeguards that the mental injuries were not feigned.

IV. Problem

Besides this ever present danger of false and fraudulent claims, the courts have through the years presented a number of other objections to allowing recovery for emotional distress. Reiterating Lord Wensleydale's theme numerous courts have said that mental disturbance cannot be measured by any reasonable standard for assessing damages, and so cannot serve in itself as a basis for the action.[7] Others have said that the physical consequences of emotional distress are too remote and therefore not proximately caused by the negligent act.[8] Another rather widely proclaimed objection to allowing a recovery for emotional distress is that the floodgates would be open to litigation.[9] Dean Prosser has pointed out that all of these objections have been refuted many times by text writers and largely abandoned by the courts.[10] The one remaining valid objection to allowing a right to recover for emotional distress is the danger of vexatious suits and fictitious claims.[11] The problem is one of adequate proof, and it would seem that sufficient standards are being developed so that it is not necessary to deny a remedy in all cases because some claims may be false.

V. Solutions Adopted by Various Jurisdictions

The cases dealing with recovery for emotional distress are in a highly confused state. This is easily understandable when viewed in the light of the dilemma faced in each case by the early courts where on the one hand they professed not to be able to redress mental damages, while on the other hand they recognized the grave injustice that would result

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[6] *Id.* at 178.

[7] *E.g.*, Perry v. Capital Traction Co., 32 F.2d 938 (D.C. Cir. 1929).

[8] *E.g.*, Cleveland, C., C. & St. L. Ry. v. Stewart, 24 Ind. App. 374, 56 N.E. 917 (1900).

[9] *E.g.*, Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896).

[10] Prosser 176-77.

[11] *Id.* at 177.

in many cases if they were forced to go uncompensated. It was this dilemma which prompted the courts to make historical precedent in such cases. For the large part the early courts proceeded in an *ad hoc* manner avoiding the formulation of too broad a general principle.[12] As indicated above, the early progress was in those cases where an already established cause of action could be found, even though the traditional scope of that action might have to be stretched a little, and in those cases where a physical injury gave credence to the resulting emotional distress.

The more recent controversy has revolved around the extension of the right of recovery to those cases in which the original wrongful act resulted in emotional distress alone, but which emotional distress caused a later physical suffering, and the even more controversial case where the only alleged wrong is the emotional distress itself. These two general classes of cases lend themselves as logical categories from which to launch an investigation of the solutions developed by the courts to combat the danger of fraudulent claims in emotional distress cases. A further study of the cases reveals that these categories can be further subdivided into those sounding in simple negligence and those in which the wrongful act is intentional or so reckless and wanton as to warrant an implication of intent.[13]

A. Recovery for Physical Consequences of Emotional Distress

1. *Negligently Caused*

Some very enlightened courts were quite early willing to accept the resultant physical injuries as a sufficient indication in themselves of the genuineness of the emotional distress where there was adequate proof of the causal connection between the original wrongful act and the physical injury.[14] Obviously the emotional reaction of plaintiff acted as a strong link in the causal chain. The great majority of courts, on the other hand, were not willing to allow such claims without some proof in addition to the resulting physical injuries.[15] It was in these courts that the now famous "impact" theory was born. These courts obviously felt that a contemporaneous contact or "impact" on the body of plaintiff at the same time the emotional distress was effected added a needed weight to plaintiff's case.[16] Surprisingly enough only a small number of these courts were logically consistent in applying the "impact" theory. They held that the emotional distress complained of must have

[12]See Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1035 (1936).

[13]See generally Annot., 64 A.L.R. 2d 100 (1959).

[14]*E.g.*, Purcell v. Saint Paul City R.R., 48 Minn. 134, 50 N.W. 1034 (1892).

[15]*E.g.*, Boston v. Chesapeake & O. Ry., 223 Ind. 425, 61 N.E.2d 326 (1945).

[16]*E.g.*, Bosley v. Andrews, 393 Pa. 161, 142 A.2d 263 (1958).

been produced by the physical impact relied on for recovery.[17] Most courts lost sight of the fact that the original purpose for the requirement was to reinforce the genuineness of the emotional distress and began allowing recovery in cases where the "impact" relied on was only an incidental and of itself could have had no relation to the emotional distress and resultant physical injury.[18] Such cases went to the absurd point of finding an "impact" in the inhalation of smoke or dust in the eye.[19] Since the requirement of impact has lost its effectiveness[20] it has been abandoned in a large majority of jurisdictions.[21] This leaves most courts willing to regard the physical consequences themselves or the circumstances of the negligent act as a sufficient guarantee of the genuineness of the claim.[22]

2. *Intentionally Caused*

Paramount among these circumstances is the character of the act involved and the attitude of the defendant in performing the act as measured against a somewhat intangible socially accepted norm of conduct, not at all unlike the law's "reasonable man." The closer a defendant's conduct comes to violating this norm the more easily the courts will allow recovery, the flagrant character of such conduct being an important guarantee that the mental disturbance it has allegedly caused is serious and not feigned.[23] Where the conduct of the actor goes to such an extreme that the courts find it willful, wanton, or reckless toward plaintiff and the consequent physical injury is present, they have little trouble in allowing recovery.[24] This element of the gravity of the actor's conduct has become such an important consideration in verifying the reality of the emotional distress that the present tendency of the courts is to recognize the right to recover for severe emotional distress alone when intentionally inflicted.[25]

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[17]*E.g.*, Monteleone v. Co-operative Transit Co., 128 W. Va. 340, 36 S.E.2d 475 (1945).

[18]*E.g.*, Block v. Pascucci, 111 Conn. 58, 149 Atl. 210 (1930).

[19]PROSSER 179.

[20]Goodrich, *Emotional Disturbance as Legal Damage*, 20 MICH. L. REV. 497, 504 (1922).

[21]At this writing eleven U.S. jurisdictions require impact, while twenty-four do not.

[22]Sections 313 and 436 of the 1934 *Restatement* support this view and in the 1948 supplement liability under § 436 is expanded to accord with the holdings of an increased number of courts, with this comment: "Fear of not securing trustworthy evidence has not deterred courts from accepting the *Restatement* rule."

[23]PROSSER 41.

[24]*E.g.*, National Life & Acc. Ins. Co. v. Anderson, 187 Okla. 180, 102 P.2d 141 (1940).

[25]Prosser, *Insult and Outrage*, 44 CALIF. L. REV. 40-42 (1956).

B. Recovery for Emotional Distress Alone

1. *Intentionally Caused*

The type of conduct required by the defendant to make him liable for this "new tort"[26] is something more than the willful or wanton misconduct or willful or wanton negligence (called recklessness in the *Restatement*) that the courts find when allowing recovery for emotional distress which has resulted in an actual physical illness.[27] The *Restatement* in recognizing the "new tort" designates the necessary conduct to come within it as "intentional."[28] That is, the defendant must have desired to cause the emotional distress and acted for that purpose or he must have known that the emotional distress was substantially certain to follow from his conduct.[29]

The rule as set forth by the *Restatement* is quite broad and one is left to an investigation of the cases to determine what limits the courts have set to define this new tort.[30] They seem to have limited it to extreme and outrageous conduct.[31] They have required more than that the actor simply intended to cause the emotional distress. They have imposed liability only where the actor's conduct has been so outrageous in character, and so extreme in degree, as to exceed all possible bounds of decency.[32]

Thus, mere profanity, obscenity or abuse, except in the case of common carriers where a special liability has been imposed, afford no cause of action to the ordinary plaintiff against the ordinary defendant.[33] Recitation of the fact situations of a couple of cases will lend an idea of the type of conduct required to be extreme and outrageous. In a

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[26]Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1939).

[27]The *Restatement* in a caveat to § 46 (Supp. 1948) states that the Institute expresses no opinion as to whether one who recklessly causes severe emotional distress to another is or is not liable for it. *But see* Prosser, *Insult and Outrage*, 44 CALIF. L. REV. 40, 54 (1956) indicating that a few cases have recognized reckless conduct as sufficient to support the action.

[28]RESTATEMENT, TORTS § 46 (Supp. 1948).

[29]*Id.* comment *a.*

[30]*Id.* comment g. This section does give some indication as follows: "In short, the rule stated in this section imposes liability for intentionally causing severe emotional distress in those situations in which the actor's conduct has gone beyond all reasonable bounds of decency. The prohbited conduct is conduct which in the eyes of decent men and women in a civilized community is considered outrageous and intolerable. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor and lead him to exclaim 'Outrageous!'"

[31]Prosser, *Insult and Outrage*, 44 CALIF. L. REV. 40, 45 (1956).

[32]*Id.* at 44.

[33]*Id.* at 45.

leading California case[34] the defendant (who filed a cross-complaint for damages for emotional distress) was threatened with bodily harm, with having his personal property destroyed, and with being run out of business unless he either joined the plaintiff association or made certain payments (for the collection of which the association brought the suit) to compensate a member of the association for a rubbish collection account which defendant had taken over. The court held that a cause of action was stated in favor of the defendant when it was shown that he was intentionally subjected to mental suffering as a result of serious threats to his physical well-being.[35] They held that an award of $4000 exemplary damages was not excessive.[36] In an Arkansas case[37] the plaintiff was roused out of bed one night and falsely accused of stealing hogs. The defendants told him that if he did not leave town within ten days they would put a rope around his neck. Their threats caused him to take his family and leave his farm and that part of the country, as a result of which he suffered great mental agony and humiliation. The court held that the plaintiff was entitled to recover for mental suffering although unaccompanied by physical injury. They said,

> Mental suffering forms the proper element of damages in actions for willful and wanton wrongs and those committed with the intention of causing mental distress. . . . In cases like this, the mental suffering was the natural and proximate consequence of the willful wrong which was the basis of the action.[38]

In a considerable number of cases the extreme and outrageous nature of the conduct of defendant seems to be reinforced by the fact that defendant in so acting is abusing some authority or apparent authority which he has over the plaintiff by virtue of a relationship such as school authorities and student,[39] landlord and tenant,[40] or creditor and debtor. In *Barnett v. Collection Serv. Co.*,[41] the plaintiff was a widow with two children and in attempting to collect a $28.75 debt from her the defendant sent her a series of coarse and threatening letters. They contained threats to sue her and to annoy her employer until he became so disgusted he would fire her, and they suggested that she was no better than a criminal. In allowing her to recover the court said, "The rule seems to be well-established where the act is willful or malicious, as

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[34]State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal. 2d 330, 240 P.2d 282 (1952).

[35]*Id.* 240 P.2d at 284.

[36]*Id.* 240 P.2d at 287.

[37]Wilson v. Wilkins, 181 Ark. 137, 25 S.W.2d 428 (1930).

[38]*Id.* 25 S.W.2d at 428-29.

[39]Johnson v. Sampson, 167 Minn. 203, 208 N.W. 814 (1926).

[40]*E.g.*, Emden v. Vitz, 88 Cal. App. 2d 313, 198 P.2d 696 (1948).

[41]214 Iowa 1303, 242 N.W. 25 (1932).

distinguished from being merely negligent, that recovery may be had for mental pain, though no physical injury results."[42] The evidence in the case established that even after defendants were advised of the fact that the letters had caused plaintiff emotional distress, they knowingly continued to send other letters of the same character.

The last mentioned fact indicates another area in which courts have readily found extreme and outrageous conduct. Where the defendant has knowledge of a special condition of plaintiff, or of circumstances which render plaintiff particularly vulnerable to emotional distress at certain conduct, and the defendant, nevertheless, pursues such conduct, his action is such that the ordinary reasonable person would call it "outrageous."[43]

2. *Negligently Caused*

Where the conduct allegedly causing the emotional distress has been merely negligent and thus falls short of extreme outrage and there has been no consequent physical injury the courts have not felt moved to recognize a cause of action.[44] The lack of any utterly intolerable conduct on the part of the actor coupled with the lack of any physical consequences to the plaintiff leave the courts very little objectively ascertainable evidence from which to become reasonably assured of the validity of the claim. There are really very few cases indeed, where the plaintiff has suffered a wrong justifying recovery when both these elements are totally missing.[45] In all cases where the recovery has been for emotional distress alone, the enormity of the outrageous conduct itself has carried the conviction that there has in fact been severe and serious emotional distress, which was neither feigned nor trivial. Where the element of physical injury is lacking, the courts will require more in the way of outrageous conduct.[46] Although many of the courts allowing recovery for emotional distress alone speak of wilful or wanton conduct that will carry an implication of intent, the fact situations themselves show more than a simple intent; they indicate extremely outrageous conduct.[47] Where there is a substantial physical injury as a result of the emotional distress, conduct less than outrageous is sufficient,[48] and where the combined injury, mental and resulting physical, is severe enough even mere negligence will suffice.[49]

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[42]*Id.* 242 N.W. at 28.

[43]*E.g.*, Nickerson v. Hodges, 146 La. 735, 84 So. 37 (1920).

[44]PROSSER 180.

[45]See *Id.* at 180-81.

[46]Prosser, *Insult and Outrage*, 44 CALIF. L. REV. 40, 53 (1956).

[47]See *Id.* at 44.

[48]See notes 23-24 *supra* and accompanying text.

[49]See notes 14 & 22 *supra* and accompanying text.

3. *Caused by a Common Carrier*

By historical precedent common carriers have been placed in a group by themselves and subjected to a more rigorous standard of conduct than the ordinary defendant.[50] The underlying reason for such treatment stems from the implied obligation of courteous consideration which the carrier undertakes when holding itself out to serve the public. Such a rule also takes on loud public policy overtones, since its strict enforcement rather insures that steps will be taken by the carrier to see that its employees are groomed as to the proper manner in which to serve the public.[51] It can thus be seen that there is no real consideration whether the employee's conduct is intentional or negligent, the liability of the carrier resting mainly on the existence of a duty arising out of the relationship. It is submitted that the existence of some such relationship will always be a big factor in the court's consideration where the claim is for emotional distress alone. The same principle was involved in the cases considered earlier dealing with debtors and creditors and where the defendant was placed in a special relationship to the plaintiff by virtue of his special knowledge as to the latter's condition.[52] The existence of the relationship is another factor toward convincing the court that plaintiff's claim should be afforded a remedy.

The type conduct required to impose liability is such that would reasonably offend the personal dignity of the ordinary passenger. The feelings of hypersensitive persons do not come within the rule. The cases point to the conclusion that the conduct must be gross and highly offensive.[53] The act does not have to be extreme and outrageous but must rise above the level of petty and trivial.[54]

For the same reasons set out above and because of the existence of a similar relationship the rule regarding carriers has been extended to innkeepers and their guests.[55]

VI. Solutions Adopted in Mississippi

A. Actionable Words Statute

At a very early date the legislature passed a statute[56] which afforded citizens a redress for a particular type of emotional distress. The statute was passed for the purpose of preventing the prevalent custom of dueling by providing the offended party a legal method by which to vindicate

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[50]Restatement, Torts § 48 (1934).
[51]*Id.* comments *c* & *d.*
[52]See text at notes 41 & 43 *supra.*
[53]Prosser, *Insult and Outrage,* 44 Calif. L. Rev. 40, 62 (1956).
[54]*Id.* at 63.
[55]*Id.* at 60.
[56]Miss. Code Ann. § 1059 (1956).

himself before the community and take his revenge out in money damages rather than blood.[57] There are two main elements necessary to bring words spoken of another within the statute: First, they must be insulting; and, second, they must be calculated to lead to a breach of the peace.[58]

The original purpose for which the law was passed has influenced its interpretation. Thus, the cause of action has been limited to a personal one between the parties involved, because its purpose was to prevent "personal difficulties."[59] A principal cannot be sued for the language used by his agent and for the same reason a corporation cannot be a party to the suit.[60] The statute has not abrogated the common law in regard to liability for insulting language, but has provided an additional remedy thereto. Therefore, if the language complained of is nondefamatory, it must be brought under the statute or no cause of action exists.[61]

B. Early Common Law

In cases brought outside the statute Mississippi was firmly committed to the early common law rule that mere words, no matter how offensive or insulting, were not actionable if not defamatory or the conduct of the defendant did not constitute an assault.[62] Likewise the early common law of this state was that there could be no recovery for emotional distress or mental anguish unaccompanied by physical injury.[63]

In a very early case[64] the court held that damages for inconvenience and annoyance were recoverable, but restricted that holding to the particular fact situation by express language:

> We do not say that damages for inconvenience and annoyance may be recovered in all cases, but from the very nature of the subject-matter of this litigation, annoyance and inconvenience is one of the main elements of damages.[65]

The case for the plaintiff was a compelling one in which the telephone company had arbitrarily deprived him of telephone service for a period of over three months. The situation was further aggravated by the fact that plaintiff lived a mile and a half from the next available telephone. The obvious injustice which forced the court to their decision in this case and the continuing trend of thought by the court on the subject of

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[57]Landrum v. Ellington, 152 Miss. 569, 120 So. 444 (1929).
[58]Huckabee v. Nash, 182 Miss. 754, 183 So. 500 (1938).
[59]Dixie Fire Ins. Co. v. Betty, 101 Miss. 880, 58 So. 705 (1912).
[60]*Ibid.*
[61]See Nowell v. Henry, 194 Miss. 310, 10 So. 2d 540 (1943).
[62]Continental Cas. Co. v. Garrett, 173 Miss. 676, 161 So. 753 (1935).
[63]*E.g.*, Gulf & S. I. R.R. v. Beard, 129 Miss. 827, 93 So. 357 (1922).
[64]Cumberland Tel. & Tel. Co. v. Hobart, 89 Miss. 252, 42 So. 349 (1906).
[65]*Id.* at 261, 42 So. at 350.

mental damages are reflected in the language of a case decided twenty-five years later and referring to this earlier case. In *Mississippi Power Co. v. Byrd*,[66] it was said:

> That was a case where the plaintiff was wrongfully deprived of telephone service for three months, and was put to expense and great *physical* inconvenience and annoyance. . . . One question decided by that case was whether such *physical* inconvenience and annoyance were elements of actual damages. . . . It will be observed that the court, in that case, did not go so far as to hold that mental pain was an element of compensatory damages. We think the court went far enough in that case. We are not now willing to go further, and hold that mental pain, in addition to inconvenience and annoyance, are elements of compensatory damages.[67] (Emphasis added.)

It is submitted that the addition of the word *physical* by this later court is indicative of the preoccupation of the courts at that time with the common law creed that there could be no recovery for mental suffering disconnected from physical injury. The existence of some objectively ascertainable standard such as physical manifestations of the suffering was felt necessary to assure the court of the validity of the claim.

The thinking of the early judges was summed up in the case of *Bonelli v. Branciere*.[68] The pertinent question before the court was whether the plaintiff could recover for emotional distress because of his permanent disfigurement, even after the actual physical suffering due to the loss of four fingers had ceased. In answering the question in the negative the court reasoned that to allow recovery for disfigurement once the physical suffering had ceased would be tantamount to permitting a recovery for mental anguish alone unaccompanied by physical suffering. An idea of the course of development of thought in this area is readily perceived in the 1951 case of *Vascoe v. Ford*.[69] That case expressly overrules the *Bonelli* doctrine denying recovery for mental anguish over permanent disfigurement as not being supported by any good reason or by any respectable number of authorities.[70] The court noted the frequent criticism that juries were prone to ignore the *Bonelli* rule and award damages for permanent disfigurement irrespective of the law. Such an attitude is indicative of the fact that the sense of justice of the average man was shocked into revolt against the rule.

Mississippi, like all other jurisdictions, early employed an exception to the rule not allowing recovery for emotional distress alone. The exception became so broad that it was regarded as a rule in itself. This

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[66] 160 Miss. 71, 133 So. 193 (1931).
[67] *Id.* at 78, 133 So. at 194-95.
[68] 127 Miss. 556, 90 So. 245 (1921).
[69] 212 Miss. 370, 54 So. 2d 541 (1951).
[70] *Id.* at 378, 54 So. 2d at 542.

rule was to the effect that if the plaintiff could show that defendant had committed an independent tort at the time of the alleged emotional distress, he could recover for the emotional distress even though he was not physically injured.[71] The independent tort served as the legally acceptable peg upon which to hang the damages for emotional distress. Such recovery became known as "parasitic" damages.[72]

C. Recovery for Physical Consequences of Emotional Distress

1. *Negligently Caused*

The narrow question presented in *Doherty v. Mississippi Power Co.*[73] is whether or not, where there is no physical injury or pain immediately resulting from the negligent act, there can be recovery for emotional distress and subsequent physical injury and pain resulting solely from the emotional distress. In answering this question the court quoted sections 306 and 312[74] of the *Restatement of Torts* and expressed the opinion that the evidence in the case did not bring the acts of the defendant in disconnecting the plaintiff's lights within the doctrine of either section. The court held there was no basis for an inference that defendant's agents intended to subject, or that they should have realized that their act involved any unreasonable risk of subjecting, plaintiff to such emotional distress as would likely result in illness or other bodily harm. It is submitted that the approach and language of the court indicates inferentially that in a case of actual intent or unreasonable risk they would allow recovery for emotional distress resulting in bodily illness.[75]

The *Doherty* case was later cited as authority for the proposition that it was of no consequence that the physical illness was preceded by and resulted from the emotional distress so long as it was shown that the physical illness was the *direct result* of the tortiously caused emotional distress.[76] In other words, the court will allow recovery for a

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[71]See 11 Miss. L.J. 319 (1939).

[72]See text at notes 4-6 *supra.*

[73]178 Miss. 204, 173 So. 287 (1937).

[74]*Id.* at 215, 173 So. at 290. These sections read as follows: § 306. "An act may be negligent, as creating an unreasonable risk of bodily harm to another, if the actor intends to subject, or realizes or should realize that his act involves an unreasonable risk of subjecting, the other to an emotional disturbance of such a character as to be likely to result in illness or other bodily harm." § 312. "If the actor intentionally and unreasonably subjects another to emotional distress which he should recognize as likely to result in illness or other bodily harm, he is subject to liability to the other for an illness or other bodily harm of which the distress is a legal cause, (a) although the actor has no intention of inflicting such harm, and (b) irrespective of whether the act is directed against the other or a third person."

[75]This contention is borne out in the later case of Lyons v. Zale Jewelry Co., 246 Miss. 139, 150 So. 2d 154 (1963).

[76]Biedenharn Candy Co. v. Moore, 184 Miss. 721, 727, 186 So. 628, 630

physical illness caused completely by a wrongful act affecting the emotions rather than the body, so long as there is substantial proof that the physical illness is a legally recognizable result of the emotional distress.

It can be summed up that the Mississippi Supreme Court will allow recovery for the physical consequences of emotional distress so long as a legally recognizable causal connection is present between the two, and the existence of an actual intent to subject, or an unreasonable risk of subjecting, the plaintiff to emotional distress is strong evidence of this legal connection.

It is also of significance that the court in *Doherty* did not make any mention of the "impact" theory.[77] It would seem that they could easily have justified their conclusion on the basis of the lack of any bodily impact on the plaintiff at the time the emotional distress was caused. The absence of this theory from the rationale of any Mississippi decisions seems conclusive that the court agreed with Professor McCormick's observation as early as 1935 that the impact theory seemed to be decidedly waning in favor.[78] He quotes an extensive passage from a New Hampshire case[79] analyzing and disposing of the arguments tendered in support of the impact theory.[80]

2. *Intentionally Caused*

Although the court in the early case of *Continental Cas. Co. v. Garrett*[81] took the approach of finding an independent tort upon which to hang parasitic damages for emotional distress, the dictum cannot be overlooked as indicating the state of the law today. In that case the plaintiff after being ill for three months filed his claim for the compensation due him under his policy of health insurance. The company agent who came to adjust the claim called plaintiff a liar and used abusive language in accusing him of filing a fraudulent claim. The court found that there was sufficient evidence to warrant the jury's finding that the agent had acted willfully and intentionally, and had by such conduct so emotionally disturbed plaintiff that he actually became physically ill. In the 1963 case of *Lyons v. Zale Jewelry Co.*[82] the *Garrett* case was cited

(1939). See Saenger Theatres Corp. v. Herndon, 180 Miss. 791, 178 So. 86 (1938); Lyons v. Zale Jewelry Co., *supra* note 75.

[77]See text at notes 16-21 *supra*.

[78]McCormick, Damages § 89, at 321 (1935). This conclusion is verified by language in Lyons v. Zale Jewelry Co., 246 Miss. 139, 159, 150 So. 2d 154, 162 (1963).

[79]Chiuchilo v. New England Wholesale Tailors, 84 N.H. 329, 150 Atl. 540 (1930).

[80]McCormick, *supra* note 78, at 321-22.

[81]173 Miss. 676, 161 So. 753 (1935).

[82]246 Miss. 139, 150 So. 2d 154 (1963).

as authority for allowing recovery in a case where a strong emotion of the mind, wrongfully caused, had produced a physical personal injury.[83] The *Lyons* case marks the farthest stage of advancement of the law covering the right to recover for emotional distress in Mississippi. That opinion is still couched in terms of recovery for resulting *physical* injury, but there is language that definitely indicates that the court in a proper case might allow recovery for mental anguish or suffering without any physical injury.[84]

D. Recovery for Emotional Distress Alone

1. *Intentionally Caused*

The court in *Lyons* with apparent approval quotes from Dean Prosser and other textwriters[85] in support of the very latest theory, " 'that there is liability for conduct exceeding all bounds usually tolerated by society, of a nature which is especially calculated to cause and does cause mental damage of a very serious kind.' "[86] The court also quotes[87] the latest supplement to the *Restatement* recognizing the "new tort," with its only prerequisite to recovery being the intentional infliction of mental suffering.[88]

Although the court, in this most current case dealing with recovery for emotional distress, quotes with approval the latest and most far reaching theories in that area, their holding is phrased in language well supported by precedent not only in this state, but in the overwhelming majority of American jurisdictions. In pertinent part it is as follows:

> The only question presented for our decision on this appeal is whether or not the facts alleged in the plaintiff's declaration, if proved, were sufficient in law to support a recovery of damages for the alleged severe mental distress and emotional and *physical injury* resulting from the wrongful conduct of the defendant's employee. . . .
>
> We are not called upon to consider here the creation of an independent (new) cause of action in tort. This Court has recognized the undeniable fact that a strong emotion of the mind, and particularly when that emotion is highly unpleasant, as from a sense of insult, may produce a physical personal injury. . . . This Court has also recognized the principle that, when *definite and objective physical injury* is produced as a result of emotional stress wrongfully caused by the defendant, a defendant under some circumstances may be held liable for such physical consequences notwithstanding the absence of any

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[83] *Id.* at 159, 150 So. 2d at 162.

[84] See *Id.* at 149-50, 150 So. 2d at 158.

[85] *Id.* at 148-53, 150 So. 2d at 157-59.

[86] *Id.* at 148, 150 So. 2d at 157. See text at notes 24-32 *supra.*

[87] *Id.* at 150-51, 150 So. 2d at 158.

[88] See note 28 *supra* and accompanying text.

> physical impact upon the plaintiff at the time of the mental shock.[89] (Emphasis added.)

It can readily be seen that the supreme court will not abandon easily the requirement of some physical injury, whether it be immediate or only the proximate result of emotional distress. The particular case, with the proper factual situation, may be long in coming, that will compel the court to expressly recognize the right of the individual to recover for his mental anguish alone, where there are absolutely no factual results upon which the court can hang the sign "physical." It is submitted, however, that in view of the language in *Lyons*, should such a case come before the supreme court, that tribunal would grant relief under the "new tort" employing the language and guidelines as extracted from the cases by Dean Prosser and proposed by him for the *Restatement*.[90]

It is felt by the writer that the Mississippi case most closely resembling the type factual situation necessary to compel recognition of the "new tort" is the 1938 case of *Saenger Theatres Corp. v. Herndon*.[91] In that case a theater ticket taker used harsh and abusive language toward a little girl fourteen years old in refusing her admittance to the theater. In allowing her a recovery of $1000.00 the court said:

> Ordinarily, it is true, damages for mental pain and suffering not accompanied by a distinct physical injury are not allowable; but this rule does not include cases of wanton or shamefully gross wrong, such as the case now before us.[92]

This case clearly contains elements of extreme and outrageous conduct exceeding all bounds usually tolerated by society. The only vestige of actual physical illness present is that the plaintiff went away crying and went to bed and had to receive home treatment.[93] Nevertheless, in referring to this case in *Lyons* the court chose to emphasize the physical aspect of the illness by designating it as a "definite and objective physical injury."[94] This would tend to indicate that it will be a rare case indeed justifying relief where the court will not be able to discover some physical ailment.

It is submitted that the *Lyons* case itself would have been a good one for recognizing the "new tort," had there not been such patent physical illness present.[95] This is especially true since the extreme and

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[89]*Id.* at 146, 159, 150 So. 2d at 156, 162.
[90]See notes 30-32 *supra* and accompanying text.
[91]180 Miss. 791, 178 So. 86 (1938).
[92]*Id.* at 799, 178 So. at 87.
[93]*Id.* at 798, 178 So. at 87.
[94]Lyons v. Zale Jewelry Co., 246 Miss. 139, 159, 150 So. 2d 154, 162 (1963).
[95]*Id.* at 145, 150 So. 2d at 155-56.

outrageous conduct of defendant was reinforced by the abuse of his creditor-debtor relationship.[96]

VII. Conclusion

The earliest recognition of the right to recover for emotional distress in the law of torts was as a parasitic element of damages where some independent cause of action had first been established. The wrongful infliction of a physical injury has always been a recognizable cause of action in tort. It was not until the relatively recent advancement in our knowledge concerning man's emotional make-up that the courts have begun to recognize a similar right to recover for an emotional injury. Although this advanced knowledge has made it an indisputable fact that one may suffer more severely from an emotional injury than from an actual physical injury, the courts are still faced with the problem that has never been present where the recovery sought is for physical injury: the problem of proving the existence of the injury at all.

It can generally be said that all courts facing this problem today are convinced of the genuineness of the claim where the emotional distress has been intentionally inflicted and resulted in actual physical injury. Likewise almost all courts, including those of Mississippi, recognize the cause of action where the emotional distress has been caused by mere negligence, but has resulted in physical injury. There are a limited number of cases in a minority of jurisdictions, not including Mississippi, allowing recovery where there is no actual physical injury, but the conduct causing the emotional distress is so intolerable that it should not be allowed to go uncorrected in a civilized community.

Joe T. Dehmer, Jr.

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[96]See text at notes 39-41 *supra.*

RECENT DECISIONS

Automobiles—Liability For Leaving Keys in an Unattended Motor Vehicle

Plaintiffs brought suit against the owner of a two-ton truck and his employees to recover damages incurred by them in an automobile accident resulting from the negligent operation of the truck by an unidentified thief. In mid-afternoon, the employees, in the course of their employment, left the truck in a "skid row" section of town with the key in the ignition, intending to leave it there for the entire night. The theft and accident occurred sometime after midnight. After a jury verdict for the plaintiff, the defendant's motion for judgment notwithstanding the verdict was sustained. Held: Reversed with direction to enter judgment on the verdict. Special circumstances, which disclose either greater foreseeability of risk or more serious injury, may create a duty on the part of one parking a vehicle to protect third persons against injuries caused by the negligent driving of a thief who, finding the keys negligently left in the ignition by the parker, steals the vehicle. *Hergenrether v. East*, 39 Cal. Rptr. 4, 393 P.2d 164 (1964).

As in other torts involving unintentional harm, the question of whether liability will be imposed upon the parker of a vehicle, who leaves it unattended with the ignition unlocked, for the negligent driving of a thief who steals the vehicle, depends upon whether the parker was negligent in leaving the vehicle in such a manner, and if so, whether such negligence was the legal or proximate cause of the resultant harm.[1] In the absence of a statute or ordinance requiring the ignition of an unattended automobile to be locked, the great majority of courts deny relief to one injured by the negligent driving of a thief.[2] Generally these courts do so on the basis that either no duty exists to protect the plaintiff from the negligent driving of a thief,[3] or that the intervening negligence of the thief is the proximate cause of the injury.[4] However, a few courts have held, even in the absence of such a statute or ordinance, that the probability of theft should have been foreseen and guarded against, and have therefore imposed liability on the parker.[5] It was recognized in one case[6] that where there is no applicable statute or ordinance, leaving a car unlocked and unattended may be negligence on the part of the parker and therefore constitute proximate cause under some circumstances and not under others. In cases where there is a statute or ordinance involved the courts are more evenly divided, the majority denying recovery. The courts which disallow recovery generally reason that, regardless of the defendant's negligence in violating the statute or ordinance, the negligent driving of the thief is an efficient intervening agency and therefore

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[1] Restatement, Torts § 430 (1934).

[2] *E.g.*, Bryant v. Atlantic Car Rental, Inc., 127 So. 2d 910 (Fla. 1961).

[3] *E.g.*, Richards v. Stanley, 43 Cal. 2d 60, 271 P.2d 23 (1954).

[4] *E.g.*, Saracco v. Lyttle, 11 N.J. Super. 254, 78 A.2d 288 (1951).

[5] *E.g.*, Mellish v. Cooney, 23 Conn. Supp. 350, 183 A.2d 753 (1962).

[6] Schaff v. R. W. Claxton, Inc., 144 F.2d 532 (D.C. Cir. 1944).

constitutes the proximate cause of the injury.[7] On the other hand, several courts have allowed recovery recognizing that such a statute or ordinance is meant to be a safety measure designed to protect the public, and its violation constitutes negligence—either negligence per se[8] or prima facie negligence[9]—and the proximate cause of the injury.[10] The Mississippi Supreme Court was faced with this situation in *Permenter v. Milner Chevrolet Co.*,[11] where a statute[12] required one leaving a car unattended to first secure the ignition. The court held that the defendant's negligence in violating the statute was not determinative, for the negligence of the thief was "an intervening agency which caused the accident complained of and superseded the original act of negligence. . . ."[13]

In cases involving factual situations similar to the instant case there is evidence of a tendency to allow recovery, especially in cases where a statute or ordinance is involved. On the other hand, where no statute or ordinance is present, the courts seem reluctant to impose liability. In those cases where no statute or ordinance is involved, recovery seems to hinge on the existence of "special circumstances," such as leaving keys in a car after dark,[14] leaving the ignition unlocked in front of a school,[15] leaving a 26-ton bulldozer unattended and unlocked,[16] or leaving keys in a truck in a "skid row" section of town with the intention of leaving it there overnight, as in the instant case. The social desirability of imposing liability in these cases, because of the complexity and interdependence of modern-day society and the ever increasing use of motorized vehicles, has been considered and given weight in many of the decisions allowing recovery.[17] Regardless of these and other arguments set forth by those who advocate the imposition of liability, the majority of courts decline to depart from the generally accepted rule that a willful, malicious, or criminal act breaks the chain of causation.[18] In *Sullivan v. Griffin*,[19] which involved a factual situation similar to the case under consideration, the Massachusetts Supreme Court observed that: "The plaintiff's contentions go far toward making the defendant an insurer as to the consequences of every accident in which his automobile might become involved while operated by the original thieves or their successors in possession."[20]

Virgil G. Gillespie

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[7]*E.g.*, Anderson v. Theisen, 231 Minn. 369, 43 N.W.2d 272 (1950).

[8]See, *e.g.*, Garbo v. Walker, 57 Ohio Op. 363, 129 N.E.2d 537 (C.P. 1955).

[9]*E.g.*, Ney v. Yellow Cab Co., 2 Ill. 2d 74, 117 N.E.2d 74 (1954).

[10]*E.g.*, Ross v. Hartman, 139 F.2d 14 (D.C. Cir. 1943).

[11]229 Miss. 385, 91 So. 2d 243 (1956).

[12]Miss. Code Ann. § 8219 (1956).

[13]Permenter v. Milner Chevrolet Co., 229 Miss. 385, 404, 91 So. 2d 243, 252 (1956).

[14]See Mellish v. Cooney, 23 Conn. Supp. 350, 183 A.2d 753 (1962).

[15]See Restatement, Torts § 302, illustration 7 (1934).

[16]See Richardson v. Ham, 44 Cal. 2d 772, 285 P.2d 269 (1955).

[17]*E.g.*, Ney v. Yellow Cab Co., 2 Ill. 2d 74, 117 N.E.2d 74 (1954).

[18]*E.g.*, Anderson v. Theisen, 231 Minn. 369, 43 N.W.2d 272 (1950).

[19]318 Mass. 359, 61 N.E.2d 330 (1945).

[20]61 N.E.2d at 332.

CHAMPERTY AND MAINTENANCE—LAYMAN—OIL AND GAS LEASE

Plaintiffs, who owned land which was sold for payment of state and county taxes, were without funds to redeem and clear title to the land. They executed an oil and gas lease to the defendants, who were laymen, in which the only real consideration given by defendants was an agreement by them to hire a lawyer and pay the expenses of a lawsuit, if necessary, to clear title to the land leased. The lease followed the usual pattern of royalty division. Defendants cleared title and initiated successful exploratory drilling for oil. Plaintiffs brought suit in equity to have the mineral lease declared null and void, contending that the consideration given for it was in the form of a champertous agreement. From a decree denying relief, the plaintiffs appealed. HELD: Affirmed. Where laymen-lessees in consideration for a lease and in good faith agree to finance necessary legal procedure to clear lessors' title, the lessors being financially unable to do so, such lease is not cancellable by the lessors as being champertous. *Lott v. Kees*, 165 So. 2d 106 (Ala. 1964).

Maintenance has been defined as the unlawful intermeddling in a lawsuit by a stranger where no personal profit is expected or stipulated; champerty is the unlawful intermeddling in a lawsuit by a stranger where the stranger is to derive some profit out of the thing sued for if his side prevails.[1] The basic concept of champerty and maintenance was in existence in the ancient Greek communities and was revealed in the early stages of Roman Law.[2] During the 14th and 15th centuries, champerty and maintenance was quite prevalent in England[3] due to a last flaring up of feudalism and the resistance to the slowly growing capitalism that was developing.[4] By the Statute of Westminster II, the practice was first outlawed by name.[5] The doctrine of champerty and maintenance was developed to repress the practice of many who, when claiming an interest to land, would transfer their rights of action to rich and powerful barons in order to obtain their support and favor.[6] Many states hold that the reasons for the rigid doctrine no longer exist,[7] and that the question of champerty and maintenance is to be decided by determining whether the agreement made is permitted or condemned by principles of public policy.[8] In some of the states the whole doctrine is regarded as obsolete.[9] The modern application of the doctrine as it pertains to laymen is limited to cases where a man, with no interests involved in a case, encourages others either to bring actions or to make defenses which they have no right to make, or would not make otherwise.[10]

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[1]Gilman v. Jones, 87 Ala. 691, 5 So. 785, 786 (1889).

[2]Radin, *Maintenance by Champerty*, 24 CALIF. L. REV. 48 (1935).

[3]RADIN, ANGLO-AMERICAN LEGAL HISTORY 214-15 (1936).

[4]Radin, *Maintenance by Champerty*, 24 CALIF. L. REV. 48, 65 (1935).

[5]3 HOLDSWORTH, A HISTORY OF ENGLISH LAW 397 (rev. 3d ed. 1923).

[6]Brown v. Bigne, 21 Ore. 260, 28 Pac. 11 (1891).

[7]Bernstein v. Humes, 60 Ala. 582, 601 (1877).

[8]Brown v. Bigne, 21 Ore. 260, 28 Pac. 11 (1891).

[9]Mathewson v. Fitch, 22 Cal. 86 (1863); Bertinck v. Franklin, 38 Tex. 458 (1873).

[10]Brown v. Bigne, 21 Ore. 260, 28 Pac. 11 (1891).

Whether or not a lease executed to a layman-lessee should be declared void because the only real consideration given, besides the usual pattern of royalty division, was an agreement to clear title to the property involved presents a question of novel impression. In *Rogers v. Sample*[11] the oil lessor was an ignorant and illiterate woman, and for that reason, the court held the contract to be void. But there, the lessee was an attorney rather than a layman. Where a layman finances litigation to clear title to land in consideration for timber products to be obtained from the land, it has been held that such an agreement is champertous and therefore void.[12] Other cases have held that a bona fide agreement by a third person to supply funds to carry on a suit, in exchange for a portion of the proceeds, is not invalid either on the grounds of champerty or because opposed to public policy.[13] Where a broker was to receive interest in lands in consideration of financing a suit, the Michigan Supreme Court,[14] in concluding that the contract was neither champertous nor against public policy, stated that the doctrine of champerty existed in Michigan as specified by statute,[15] only to the attorney-client relationship. Although the Alabama court in the principal case made no mention of the fact, by statute,[16] the defense applies only to an attorney-client relationship. Mississippi has a statute[17] similar to the Alabama statute[18] pertaining to attorneys; but, Mississippi has an additional statute,[19] unlike Alabama and a number of other states, which prohibits the solicitation and stirring up of litigation by laymen.

The principal case represents the first time, in the oil and gas field, that a court has been presented the question of whether or not the doctrine of champerty and maintenance is to be applied when a layman hires an attorney to clear the lessee's title in exchange for an oil and gas lease on the property involved. The court was careful to point out that "the relation of attorney and client did not exist, and this opinion is confined to the case before us."[20] This case and others of like character represent excellent illustrations of the problems which confront courts in cases of champerty and maintenance. In substance, twentieth century jurists are required to apply anachronistic doctrines which are creatures of feudalism and as such have no application in contemporary litigation. In this twentieth century, the giving of aid in a lawsuit should not be considered bad ipso facto since such aid often prevents oppression to the poor and ignorant; also, it often disposes of problems and misunderstandings instead of allowing them to continue and become more complex. Since courts of equity have jurisdiction to study the particular facts and circumstances of each situation and to give equitable relief

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[11]207 Ky. 150, 268 S.W. 799 (1925).

[12]Gowen v. New Orleans Naval Stores Co., 157 Ga. 107, 120 S.E. 776 (1923).

[13]Grant v. Stecker & Huff, Inc., 300 Mich. 174, 1 N.W.2d 500 (1942); Brown v. Bigne, 21 Ore. 260, 28 Pac. 11 (1891).

[14]Grant v. Stecker & Huff, Inc., 300 Mich. 174, 1 N.W.2d 500 (1942).

[15]MICH. COMP. LAWS § 13600 (1929).

[16]ALA. CODE tit. 46, §§ 44, 53 (1958).

[17]MISS. CODE ANN. § 8683 (1956).

[18]ALA. CODE tit. 46, §§ 44, 53 (1958).

[19]MISS. CODE ANN. § 2049-01 (1956).

[20]Lott v. Kees, 165 So. 2d 106, 111 (Ala. 1964).

when warranted, it is submitted that the courts should discard the obsolete and cumbersome doctrine of champerty and maintenance. The Mississippi Supreme Court has never construed the statute[21] which prohibits the solicitation and stirring up of litigation by laymen. However, it is suggested that the correct result was reached in the principal case and that in construing the Mississippi statute[22] the court should take cognizance of the equities involved and determine whether or not the contract is against public policy.

James S. George

Constitutional Law—Discrimination by Systematic Inclusion of Negroes on Grand Jury

Defendant, a Negro, was convicted of aggravated rape upon a white woman and sentenced to death.[1] He petitioned to the United States District Court for habeas corpus on the grounds that his conviction violated his constitutional rights under the equal protection clause of the fourteenth amendment. On the list of twenty from which the state grand jury was drawn, there were six Negroes intentionally included. The accused claimed this was discrimination because of his race or color. The district court held that there was no discrimination against him in the selection of a grand jury;[2] whereupon he appealed to the circuit court of appeals. Held: Reversed and remanded. Where Negroes are purposefully included on the grand jury, there is discrimination against an accused Negro because of his race or color, contrary to the constitutional requirements of the fourteenth amendment. *Collins v. Walker,* 329 F.2d 100, *aff'd on rehearing,* 335 F.2d 417 (5th Cir.), *cert. denied,* 85 Sup. Ct. 189 (1964).

Since 1880 the leading authority in regard to systematic exclusion of Negroes on grand juries has been *Neal v. Delaware.*[3] From a practical viewpoint no Negro could be considered as qualified to serve on either a petit or grand jury prior to that time.[4] In the *Neal* case the Supreme Court reversed a conviction because there was an intentional exclusion of Negroes in the selection of a grand jury.[5] It was not a question of systematic limitation but rather a case of absolute and determined exclusion with no ameliorating factor.[6] The Supreme Court reversed many convictions because of racial exclusion in the selection of grand and petit juries,[7] but the principle of the *Neal* case was not expanded. Then, in *Pierre v. Louisiana,*[8] the Court reversed a conviction where the

[21] Miss. Code Ann. § 2049-01 (1956).
[22] *Ibid.*

[1] State v. Collins, 242 La. 704, 138 So. 2d 546, *cert. denied,* 371 U.S. 843 (1962).
[2] Collins v. Walker, 215 F. Supp. 805 (E.D. La. 1963).
[3] 103 U.S. 370 (1880).
[4] Gibson, *Racial Discrimination on Grand Juries,* 3 Baylor L. Rev. 29, 30 (1950).
[5] Neal v. Delaware, 103 U.S. 370 (1880).
[6] Gibson, *Racial Discrimination on Grand Juries,* 3 Baylor L. Rev. 29-30 (1950).
[7] *E.g.,* Rogers v. Alabama, 192 U.S. 226 (1904).
[8] 306 U.S. 354 (1939).

discrimination was confined to the selection of the grand jury even though there had been no discrimination in the selection of the petit jury. Consequently, evidence of racial discrimination in the selection of a grand jury was held to be prima facie grounds for a reversal.[9] It has further been held that the accused is not entitled to proportional limitation in the selection of grand jurors based on their race or color.[10] The Court has decided that although there was no intentional exclusion, inaction on the part of the jury commissioners in finding out whether there were any legally qualified Negroes to serve on the grand jury amounted to discrimination.[11] The above cases, it will be noted, deal with the problem of systematic exclusion in the selection of grand or petit juries. The question therefore arises whether there is a correlation between the theories of systematic *exclusion* and systematic *inclusion*.[12]

In *Akins v. Texas*[13] the Supreme Court affirmed a conviction, over the objection of discrimination, where there was a genuine effort on the part of the commissioners to meet the requirements of the law in selecting a grand jury. But in *Cassell v. Texas* the Court, by way of dictum, said that systematic inclusion as well as systematic exclusion is discrimination and violates the fourteenth amendment.[14] Jurymen should be selected as individuals on the basis of qualifications without regard to their race or color.[15] The opinion of the instant case is based upon the premise set out in *Cassell.* The Court stated that the commissioners have an affirmative duty to reflect a general cross-section of the population by including qualified Negroes on the general venire list of three hundred.[16] A distinction exists, however, between the general venire list and the list of prospective grand jurors composed of twenty citizens taken from the general venire list.[17] It is in determining this grand jury venire of twenty that there can be no systematic inclusion of Negroes; the selection must be made without any regard whatever to race or color.[18] It is said that the practical result of any attempt to give an accused more than equal protection of the laws may be that he is given somewhat less than equal protection.[19] The Constitution is color-blind;[20] therefore, commissioners should not consciously take color into account when selecting grand jurors.[21] When Negroes are systematically included by limiting the number, there is a corresponding systematic exclusion of Negroes from the remaining number on the venire.[22] The fact that there is a bona fide intention of the jury commissioners to be impartial does not require

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[9]Hill v. Texas, 316 U.S. 400, 404 (1942).

[10]Cassell v. Texas, 339 U.S. 282, 286-87 (1950).

[11]See Hill v. Texas, 316 U.S. 400, 404 (1942).

[12]See Gibson, *Racial Discrimination on Grand Juries*, 3 BAYLOR L. REV. 29, 31 (1950).

[13]325 U.S. 398 (1945).

[14]Cassell v. Texas, 339 U.S. 282, 287 (1950) (dictum).

[15]*Id.* at 286.

[16]Collins v. Walker, 335 F.2d 417, 420 (5th Cir. 1964).

[17]*Ibid.*

[18]*Ibid.*

[19]*Id.* at 434 (appendix to rehearing).

[20]Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (dissenting opinion).

[21]Cassell v. Texas, 339 U.S. 282, 295 (1950).

[22]Collins v. Walker, 335 F.2d 417, 434 (5th Cir. 1964) (appendix to rehearing).

the accused to accept their individual concept of fairness in place of the equal protection of the laws.[23]

As long as there is human choice in the selection of grand juries, the holding of this case places jury commissioners in a dilemma. If they systematically exclude Negroes from the grand jury it is discrimination; if they methodically include Negroes on the grand jury it is discrimination. It may well be argued that *Collins v. Walker* fails to present a practical manner by which this deeply entrenched problem may be solved. Where a general prejudice exists, it cannot be purged easily when human discretion is a factor.[24] The only way to counteract a prejudice is through a purposeful effort on the part of those who are prejudiced.[25] The selection of a grand jury must be arranged so that the jury commissioners may make a conscious effort to neither exclude nor include persons on the grand jury venire; or a system should be established allowing the commissioners to draw by lot the members of the grand jury venire without cognizance of color. Although a denial of certiorari by the Supreme Court, as in the present case, indicates neither an affirmance nor a reversal of the holding of the court below, it is submitted that this case is convincing authority for the proposition that commissioners must make the final selection of members for the grand jury without reference to their race or color.

Landman Teller, Jr.

Constitutional Law—Equal Protection Clause Affecting State's Closing of Public Schools and Maintaining Private Schools

In an attempt to avoid court-ordered desegregation of public schools, the School Board of Prince Edward County, Virginia, closed all public schools in that county and allowed private schools which were supported both by private contributions and public funds to be substituted in their place. Since public schools were operated in all other counties of Virginia, this suit was brought by Negro school children seeking to enjoin the school board officials from refusing to operate an efficient system of public education in Prince Edward County and to enjoin the payment of public funds to support private schools which excluded students on account of race. The district court granted the injunctive relief sought, holding that the action of the school authorities was designed to preserve segregated schools contrary to the law of the land. The court of appeals reversed, whereupon the Supreme Court granted certiorari. Held: Reversed and remanded. A state which separates white and Negro school children by contemporaneously closing the public schools in a single county and helping finance (directly or indirectly) private segregated schools in that county violates the equal protection clause of the fourteenth amendment. *Griffin v. County School Board of Prince Edward County*, 375 U.S. 391 (1964).

In 1896, the Supreme Court treated the equal protection clause of

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[23] *Ibid.*

[24] Gibson, *Racial Discrimination on Grand Juries*, 3 Baylor L. Rev. 29, 39 (1950).

[25] *Ibid.*

the federal constitution as affording equal protection of the laws to Negroes when equal but separate facilities were provided.[1] It was not until 1938 that the courts began to modify the application of the equal protection clause.[2] In that year the Supreme Court found a violation of the equal protection clause in a state law school's refusal to admit a Negro applicant, even though the state offered to pay the applicant's tuition to a good out-of-state law school.[3] In 1948, judicial enforcement of private agreements designed to prevent Negroes from buying in certain residential sections were held to be a violation of the fourteenth amendment.[4] The Court in 1950 decided Texas' Negro law school was inferior to the University of Texas Law School, and ordered the admission of a Negro applicant to the latter school.[5] In the same year the Court held that the fourteenth amendment guaranteed a Negro college student consideration by school officials equal to that given other students.[6] In 1954, the Court extended the application of the equal protection clause to secondary schools.[7] According to *Brown v. Board of Education,* the separate but equal doctrine has no place in education.[8] Even though public facilities are equal, the court found that segregation has a harmful psychological effect on Negro students and deprives them of the benefits of a racially integrated school.[9]

Several southern states adopted plans intended to circumvent the *Brown* decision; however, the plans were soon struck down by the courts.[10] *Aaron v. McKinley* invalidated Arkansas legislation allowing the governor to close schools and hold an election to determine whether or not schools should be integrated while making state funds available for non-profit private schools.[11] *Bush v. Orleans Parish School Board* struck down Louisiana legislation which empowered the governor to close all schools if one school was integrated or threatened with disorder.[12] In both the *Aaron* case[13] and the *Bush* case[14] the decisions were based on a violation of the due process clause. In 1961, the district court enjoined Louisiana's practice of closing public schools while allowing private schools to be operated in their place.[15] According to the court, this practice denied Negroes their constitutional right to attend public

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[1]Plessy v. Ferguson, 163 U.S. 537 (1896).

[2]Missouri *ex. rel.* Gaines v. Canada, 305 U.S. 337 (1938).

[3]*Ibid.*

[4]Shelley v. Kraemer, 334 U.S. 1 (1948).

[5]Sweatt v. Painter, 339 U.S. 629 (1950).

[6]McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950).

[7]Brown v. Board of Education, 347 U.S. 483 (1954).

[8]*Id.* at 495.

[9]*Id.* at 494.

[10]See Knowles, *School Desegregation,* 42 N.C.L. Rev. 67 (1963).

[11]173 F. Supp. 944, 952 (E.D. Ark. 1959), *aff'd mem.* Faubus v. Aaron, 361 U.S. 197 (1959).

[12]187 F. Supp. 42, 45 (E.D. La. 1960), *aff'd mem.* 365 U.S. 569 (1961).

[13]Aaron v. McKinley, 173 F. Supp. 944, 950 (E.D. Ark. 1959), *aff'd mem.* Faubus v. Aaron, 361 U.S. 197 (1959).

[14]Bush v. Orleans Parish School Board, 187 F. Supp. 42, 45 (E.D. La. 1960), *aff'd mem.* 365 U.S. 569 (1961).

[15]Hall v. St. Helena Parish School Board, 197 F. Supp. 649, 656 (E.D. La. 1961), *aff'd mem.* 368 U.S. 515 (1962).

schools.[16] In the noted case the Supreme Court says that a state, for segregation purposes, may not close the schools in a single county and allow private schools to be operated in their place.[17] In reaching this decision the court relied heavily on prior invalidation of similar plans.[18] Justices Harlan and Clark dissented on the grounds that the federal courts do not have the power to reopen public schools.[19] It is submitted that if in the future more judges join with Justices Harlan and Clark such a plan as that in *Griffin* may be upheld. As of now, with the decision in *Griffin*, the courts do have the power to reopen schools which have been closed to circumvent integration.[20]

A private school bill was recently enacted by the Mississippi Legislature.[21] Under this statute the public schools remain open but state funds are made available for tuition grants to those children attending private schools.[22] The Supreme Court has not considered the constitutionality of the Mississippi plan. Recent decisions indicate that the Mississippi plan will also fall prey to the equal protection clause.[23] The noted case suggests that the Supreme Court will nullify any plan aimed at public school segregation.[24] State officials cannot nullify constitutional rights "through evasive schemes for segregation whether attempted 'ingeniously or ingenuously'. . . ."[25] It has been urged that separate schools will promote public peace, but the Supreme Court has said that such a peace cannot be accomplished by laws which deny Negroes rights protected by the Constitution,[26] and this decision indicates that the Court will outlaw any plan which hints of segregation.

Aleita Ann Sullivan

Constitutional Law—Right to Assistance of Counsel Precedes Indictment

The defendant became the object of particular focus in an investigation of an unsolved murder. He was taken into police custody and interrogated in a manner lending itself to the extraction of incriminating statements. The defendant was denied the opportunity to consult with his lawyer when it was requested, and the police did not effectively warn him of his constitutional right to remain silent. He was convicted by use of his statement so acquired and the Supreme Court of Illinois

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[16] *Ibid.*

[17] Griffin v. County School Board of Prince Edward County, 84 Sup. Ct. 1226, 1233 (1964).

[18] *Ibid.*

[19] *Id.* at 1235.

[20] *Id.* at 1234.

[21] Miss. Laws 1964, ch. 27, 1st Extraordinary Sess.; Miss. Laws 1964, ch. 31, 1st Extraordinary Sess.

[22] *Ibid.*

[23] See *e.g.*, Griffin v. County School Board of Prince Edward County, 84 Sup. Ct. 1226 (1964).

[24] *Id.* at 1233.

[25] Cooper v. Aaron, 358 U.S. 1, 17 (1958).

[26] *Id.* at 16.

affirmed. HELD: Reversed. When an investigation is no longer an inquiry into an unsolved crime but has begun to focus on a particular suspect, the denial by police to honor the request of an accused to consult with his lawyer during an interrogation constitutes a denial of the assistance of counsel, and thereby renders inadmissible in a state criminal trial any incriminating statement so elicited. *Escobedo v. Illinois,* 84 Sup. Ct. 1758 (1964).

Comparatively early in our history the sixth amendment's provision for trial by jury was said to be compulsory in criminal prosecutions in incorporated territories.[1] Although refusing for a long time to review the constitutionality of state action,[2] the Supreme Court did give warning of future action, stating that every kind of state legislation may be subject to scrutiny when essential justice was involved.[3] Then, in 1932, the Supreme Court acknowledged the right to counsel in a state prosecution of a capital case, by virtue of the fourteenth amendment, under the special circumstances present of ignorance and youth on the part of the accused.[4] The measure of protection available to defendants in cases less than capital and under circumstances other than those specifically enumerated was left undefined. A period of uncertainty followed. In *Avery v. Alabama,*[5] the Court held that the fourteenth amendment did not limit a state's power to try and deal with crime within its borders,[6] and that the Court must respect and be reluctant to interfere with a state's determination of its own social policy.[7] Yet, the next year, the Court held that a denial of due process existed where an uneducated, inexperienced man was tried without aid of counsel and thereby tricked into pleading guilty.[8] *Betts v. Brady*[9] narrowed the scope of an accused's right to assistance of counsel by establishing a standard by which an asserted denial of due process was to be tested: whether the result measured up to the concept of a fair trial or fundamental justice, considering the totality of the facts involved.[10] Although admitting that a denial of counsel in some cases might be a deprivation of due process, it held that such right did not exist in all cases.[11] Much difficulty was thereafter experienced in the interpretation and application of the *Betts* decision. *Williams v. Kaiser*[12] stated that the failure of a state to appoint counsel in felony cases was a denial of due process.[13] Two years later the fair trial doctrine of *Betts v. Brady* was again cited as the correct standard,[14] while a case in the following year[15] using a

[1] *E.g.*, Reynolds v. United States, 98 U.S. 145, 154 (1879).
[2] *E.g.*, Munn v. Illinois, 94 U.S. 113 (1877).
[3] Hurtado v. California, 110 U.S. 516, 532 (1884).
[4] Powell v. Alabama, 287 U.S. 45, 71 (1932).
[5] 308 U.S. 444 (1940).
[6] *Id.* at 446.
[7] *Id.* at 447.
[8] Smith v. O'Grady, 312 U.S. 329, 334 (1941).
[9] 316 U.S. 455 (1942).
[10] *Id.* at 462.
[11] *Id.* at 473.
[12] 323 U.S. 471 (1945).
[13] *Id.* at 476.
[14] Foster v. Illinois, 332 U.S. 134, 136 (1947).
[15] Wade v. Mayo, 334 U.S. 672 (1948).

similar test but not referring to the *Betts* case, held that where one charged with a crime is incapable of his own defense, by reason of age, ignorance, or mental incapacity, the refusal of a state to appoint counsel at his request did constitute a denial of due process.[16] The view that the state was not obligated to furnish counsel for a defendant in a non-capital trial persisted for several more years.[17]

Realizing the difficulties involved in the application of the *Betts* doctrine, the Court in 1963 re-defined the concept of due process in relation to the right to counsel.[18] Overruling *Betts v. Brady*,[19] *Gideon v. Wainwright*[20] held that every person accused of a crime, whether state or federal, is entitled to a lawyer at his trial. The Court recognized the conflict of interests arising over the extent of this constitutional right to assistance of counsel. On the one hand, if a defendant was forced to plead without the assistance of counsel, he was often incapable of adequately making his own defense and was no match for the professional prosecutor he faced in the court room.[21] On the other hand, if the right to counsel was afforded prior to indictment, the number of confessions obtained by police would be greatly diminished, as most confessions were obtained before indictment.[22] The courts, however, have interpreted this balance to be weighted in favor of the right of an accused to be advised by his lawyer of his privilege against self-incrimination,[23] and thus it was soon recognized that the "guiding hand of counsel," as spoken of in *Powell*,[24] was required for delicate situations other than the trial itself.[25] Once this right constitutionally arises, no request is necessary as a requisite.[26] *Massiah v. United States*[27] held that assistance of counsel attaches even to post indictment interrogations, since that period is crucial to a proper defense.[28] What happens at an interrogation may certainly affect the whole trial,[29] and may reduce the trial to a mere appeal from the interrogation, with conviction assured by the pre-trial examination.[30] *Crooker v. California*[31] rejected the theory that every denial of request to contact counsel was an infringement without regard to the circumstances; but it did hold that the right is violated, not only if the accused is deprived of counsel at trial, but also if he is deprived of counsel for any part of the pre-trial proceedings

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[16]*Id.* at 683.

[17]*E.g.*, Gallegos v. Nebraska, 342 U.S. 55, 64 (1951).

[18]Gideon v. Wainwright, 372 U.S. 335 (1963).

[19]316 U.S. 455 (1942).

[20]Gideon v. Wainwright, 372 U.S. 335, 345 (1963).

[21]Williams v. Kaiser, 323 U.S. 471, 476 (1945).

[22]See Barrett, *Police Practices and the Law—From Arrest to Release or Charge*, 50 CALIF. L. REV. 11, 43 (1962).

[23]*E.g.*, Spano v. New York, 360 U.S. 315, 326 (1959).

[24]Powell v. Alabama, 287 U.S. 45, 69 (1932).

[25]*E.g.*, Powell v. Alabama, 287 U.S. 45, 57 (1932).

[26]*E.g.*, Carnley v. Cochran, 369 U.S. 506 (1962).

[27]377 U.S. 201 (1964).

[28]*Ibid.*

[29]*E.g.*, Hamilton v. Alabama, 368 U.S. 52 (1961).

[30]*In re* Groban, 352 U.S. 330, 344 (1957) (dissenting opinion).

[31]357 U.S. 433 (1958).

so as to prejudice the fundamental fairness of his subsequent trial.[32] This search for a delineation of the concept of the right to assistance of counsel has culminated in the present case of *Escobedo v. Illinois.* This case strikes down the distinction between post- and pre-indictment confessions by providing that when the police process shifts from investigatory to accusatory and the focus is on the accused for the purpose of eliciting a confession, the adversary system involving the conflicting interests of the individual and the state begins to operate, and at this point the accused must be allowed to consult with his lawyer.[33]

The decision in the present case will have far-reaching results. It is perhaps as noteworthy for the questions it leaves unanswered as for the problems it resolves. The Second Circuit case of *United States ex rel. Durocher v. Lavallee*[34] held that the assistance of counsel requirements must be applied retroactively, but the Supreme Court has not as yet resolved the point. Other questions also remain. The United States Court of Appeals for the Second Circuit has said that there is no definite point at which the right to counsel automatically attaches, but the defendant is so entitled at any critical stage, as determined by the particular facts of each case.[35] The decision in the present case has not established any clear point at which the right will definitely arise in all cases, but has further demonstrated the type of circumstances which will produce such a right. Also unresolved is the question as to what types of offenses are to be included under this decision. The offense here involved is capital, murder to be exact, and although the distinction between capital and non-capital crimes has been struck down in other cases involving the right to assistance of counsel, the Court has made no stipulation as to this point in this holding. Finally, there is the practical question of exactly what type of assistance of counsel has been granted under this decision. There is a great difference between the right of an accused to have the assistance of counsel of his own choice and the right of an accused to have counsel assigned for his defense. Will this holding be extended to give the accused the right to have counsel assigned? Furthermore, if it is so extended, how will such assistance of counsel be organized and administered? Will the state be required to retain legal aid for everyone primarily suspected of a crime? If so, in what manner will this be accomplished? Only further litigation will resolve the problems arising under this decision.

William F. Hagan

Constitutional Law—Right to Counsel in Criminal Prosecutions to be Applied Retroactively

Claiming that they were not advised of their right to counsel when pleading guilty, four New York prisoners sought to invalidate their state court convictions under the due process clause of the fourteenth amendment. In district court opinions which preceded the Supreme Court's

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[32] *Id.* at 440.

[33] Escobedo v. Illinois, 84 Sup. Ct. 1758, 1766 (1964).

[34] 330 F.2d 303 (1964).

[35] United States *ex rel.* Cooper v. Reincke, 333 F.2d 608 (1964).

decision in *Gideon v. Wainwright*,[1] all four relators were denied relief on the ground that they had failed to establish that their convictions were lacking in fundamental fairness as required by *Betts v. Brady*.[2] HELD: Reversed and remanded. State convictions, when founded on a plea of guilty by defendants unaware of their right to counsel, are invalid, even in the absence of a showing of prejudice or a request for counsel, and such right to counsel will be applied retroactively to those defendants whose convictions preceded *Gideon v. Wainwright*. *United States ex rel. Durocher v. LaVallee*, 330 F.2d 303 (2d Cir. 1964).

It has long been recognized that in federal courts the right to counsel rests upon the specific language of the sixth amendment.[3] The Supreme Court has stated that the sixth amendment bars a valid conviction and sentence in federal courts if the accused is not represented by counsel and has not competently and intelligently waived such right.[4] In the *Betts* decision the Supreme Court laid down the "fundamental fairness" rule which was used as a guideline by the courts in subsequent decisions relating to the right to counsel.[5] In that decision the Court held that a denial of counsel per se would not invalidate a criminal conviction.[6] Before such a conviction would be overturned, it was incumbent upon the defendant to show that the denial of counsel in the particular case constituted a denial of fundamental fairness, "shocking to the universal sense of justice."[7] In effect the Court denied that the right to counsel, required in every federal proceeding by the sixth amendment, was made applicable to the states by the fourteenth amendment.[8] In 1963, the Supreme Court in *Gideon v. Wainwright*[9] overruled the "fundamental fairness" test and laid down the sweeping proposition that the right to counsel is a fundamental right in all criminal prosecutions, for capital and non-capital offenses alike. Under the *Gideon* rule the failure of the court to appoint counsel for an indigent defendant, in the absence of an express waiver of that right on the part of the defendant, is sufficient to invalidate the conviction under the due process clause of the fourteenth amendment.[10] In the *Gideon* decision it was held that the right of indigent defendants to be provided with counsel is so fundamental in its character as to be made obligatory upon the states by the fourteenth amendment.[11]

The present case extends the application of the *Gideon* decision to those defendants convicted without the benefit of counsel in proceedings antedating the conviction of Clarence Gideon himself.[12] No longer is it necessary that any substantial injury be shown to have resulted from

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[1]372 U.S. 335 (1963).
[2]316 U.S. 455 (1942).
[3]*Id.* at 461.
[4]Johnson v. Zerbst, 304 U.S. 458 (1938).
[5]Betts v. Brady, 316 U.S. 455 (1942).
[6]See Betts v. Brady, 316 U.S. 455, 471 (1942).
[7]*Id.* at 462.
[8]*Id.* at 461.
[9]372 U.S. 335 (1963).
[10]*Ibid.*
[11]*Ibid.*
[12]United States *ex rel.* Durocher v. LaVallee, 330 F.2d 303, 311 (2d Cir. 1964).

the absence of counsel, as was required under the *Betts* rule.[13] Where defendants are indigent at the time of trial, and are not afforded court-appointed counsel at every step of the proceeding, any conviction arising therefrom will be invalid, unless the right to counsel has been expressly waived.[14] No longer can the *Gideon* requirement of court-appointed counsel be limited to cases in which "not guilty" pleas have been entered —the context in which *Gideon* itself was decided.[15] Nor will a defendant who is otherwise entitled to the assistance of counsel lose that right by his failure to request an attorney at the time of his conviction.[16] Such right does not depend upon a request.[17] The courts have long recognized that a plea of guilty cannot operate as a waiver of the right to court-appointed counsel.[18] Under the declaratory theory of judicial decisions the character generally ascribed to such decisions is that they do not make law, but are merely declaratory of the law as it has always existed.[19] Such a theory necessarily requires that overruling decisions be given retroactive application.[20] The effect of such overruling decision is to declare that the prior decision was not only inaccurate, but that it never was the law.[21] However, it has never been accepted that an overruling decision must of necessity be given retroactive application in each and every case.[22] In a leading case the Supreme Court recognized that in overruling a former decision a court has the power to declare whether or not its ruling shall be retroactive.[23] In the present case the court stated that once it has been determined that a defendant was convicted without the constitutional right to counsel, a new trial should be granted.[24] It should make no difference whether the violation occurred before or after the *Gideon* decision.[25] Were the court to deny retroactivity under such circumstances, it would assign a lower constitutional status to prisoners who were denied the right to counsel prior to the *Gideon* decision than to those convicted afterward.[26] The fear of overworking the judiciary from an administrative standpoint should not compel the court to deny retroactivity to an overruling decision, as has occurred in certain cases.[27] The court in the *LaVallee* case was cognizant of the evils which could flow from its decision to make *Gideon*

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[13]See Gideon v. Wainwright, 372 U.S. 335 (1963).

[14]*Id.* at 340.

[15]See Doughty v. Maxwell, 376 U.S. 202 (1963), *reversing per curiam*, Doughty v. Sacks, 175 Ohio St. 46, 191 N.E.2d 727 (1963).

[16]Carnley v. Cochran, 369 U.S. 506, 513 (1962).

[17]*Ibid.*

[18]Rice v. Olson, 324 U.S. 786 (1945).

[19]Snyder, *Retrospective Operation of Overruling Decisions*, 35 ILL. L. REV. 121, 122 (1940).

[20]*Ibid.*

[21]See Snyder, *Retrospective Operation of Overruling Decisions*, 35 ILL. L. REV. 121, 122 (1940).

[22]*Id.* at 130.

[23]Great No. Ry. v. Sunburst Oil & Ref. Co., 287 U.S. 358 (1932).

[24]United States *ex rel.* Durocher v. LaVallee, 330 F.2d 303, 311 (2d Cir. 1964).

[25]*Ibid.*

[26]*Id.* at 312.

[27]*E.g.*, Griffin v. Illinois, 351 U.S. 12, 25 (1956).

retroactive.[28] In many instances it will be difficult, if not impossible, to obtain convictions in these new proceedings. Key witnesses have died or disappeared, and the passage of time has made the acquiring of evidence and the reconstructing of events difficult. Recognition of these practical considerations compelled a strong dissent by two of the judges in the instant case.[29] However, the majority of the court shared the opinion of most legal writers that the fear of over-working the judiciary should never be used to defeat the requirements of justice which compel retroactive application of the new rule in favor of convicted prisoners.[30]

An investigation of the situation in the state of Florida reveals the possible consequences of the *LaVallee* decision. Of the 8,000 prisoners in Florida penal institutions, 4,542 were convicted without the benefit of counsel.[31] By late 1963, over 3,000 had already petitioned for a review of their convictions in light of the *Gideon* decision.[32] A large number of prisoners similarly situated no doubt exists in Mississippi, which at the time of the *Gideon* decision was one of the five states which had no laws requiring counsel for indigent prisoners, except in capital cases.[33] This knowledge raises the fear in the minds of many that our court systems will be overburdened in administering these new proceedings. This fear may well be justified. It has been said that there are two demands laid upon a judicial system—the demand for stability in judicial action and the insistence that pre-existing rules shall be altered in keeping with changing conceptions of social policy.[34] In the *LaVallee* case the court properly exercised its judicial discretion and concluded that the judicial stability to be obtained in limiting *Gideon* to prospective application was subordinate to the overriding demand to extend the constitutional right to counsel to those prisoners whose convictions antedated the *Gideon* decision. The Supreme Court long ago recognized that whatever is "implicit in the concept of ordered liberty"[35] and "essential to the substance of a hearing"[36] is within the procedural protection afforded by the constitutional guarantee of due process. In light of this long-recognized principle of constitutional law, it is difficult to see how the court could have ruled otherwise in the present case. In conclusion it is worthy to note that the Supreme Court has recently applied a statute retroactively, thereby abating all criminal prosecutions commenced prior to its enactment.[37]

Howard Owen Leach

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[28]330 F.2d 303, 312 (2d Cir. 1964).

[29]*Id.* at 314 (dissenting opinion).

[30]Comment, *Prospective Overruling and Retroactive Application In The Federal Courts*, 71 YALE L.J. 950, 951 (1962).

[31]Time, Oct. 18, 1963, p. 53.

[32]*Ibid.*

[33]*Ibid.* Other states were Florida, North Carolina, South Carolina, and Alabama.

[34]See Note, *Retroactive Effect of an Overruling Decision*, 42 YALE L.J. 779 (1933). See generally POUND, INTERPRETATIONS OF LEGAL HISTORY (1923); CARDOZO, THE GROWTH OF THE LAW, 143 (1942).

[35]Palko v. Connecticut, 302 U.S. 319, 325 (1937).

[36]*Id.* at 327.

[37]Hamm v. City of Rockhill, 85 Sup. Ct. 384, 392 (1964).

Criminal Law—Statutory Rape—Mistake as to Age of Prosecutrix as Possible Defense

The defendant was found guilty of a violation of a California statute[1] making intercourse with a female, under the age of 18 years and not the wife of the perpetrator, the crime of rape. At the time of the admitted intercourse prosecutrix was 17 years, 9 months of age. Defendant offered evidence to support his contention that he held the reasonable belief that prosecutrix was above the age of consent, which evidence was not admitted. Defendant appealed, citing the refusal to admit this evidence as error. Held: Reversed and remanded. In a prosecution for statutory rape, defendant's reasonable belief that prosecutrix had reached the age of consent could, when fully developed, constitute a defense to the prosecution. *People v. Hernandez,* 39 Cal. Rptr. 361, 393 P.2d 673 (1964).

The crime of statutory rape, or carnal knowledge of a female child, may be generally defined as unlawful sexual intercourse with a female, other than the wife of the accused, who is below the age of consent of the jurisdiction involved.[2] The purpose of the statutes which establish the crime would appear to be the protection of the young and innocent girl,[3] and more precisely the discouraging, and punishing, of sexual intercourse with such a girl.[4] There appear to be but two essential elements of the crime, the age of the girl and the act of intercourse.[5] The accused need have no specific intent to commit statutory rape; it is sufficient if he has only the bare intent to engage in the act of intercourse.[6] Neither is force an element of the crime, though a conviction can be sustained under an indictment for statutory rape when force is proved.[7] Lack of consent by the girl cannot be said to be an element, for the underage female is presumed at law to be incapable of intelligently consenting to intercourse, and any consent given is therefore negated.[8] Carrying this reasoning a step further, the majority of courts hold that the touching of an underage girl, with the intent to engage in intercourse with her, is sufficient to constitute assault with intent to rape.[9] Because statutory rape is a legislative product of the various jurisdictions, many differences in the form of the statute are evident.[10] One important difference occurring among the states is the varying age of consent, which ranges from 14 to 21 years of age.[11] When no age

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[1] Cal. Pen. Code § 261.

[2] See generally Perkins, Criminal Law 110 (1957).

[3] See Kolb v. State, 129 Miss. 834, 93 So. 358 (1922).

[4] State v. Hensley, 75 Ohio 255, 79 N.E. 462 (1906).

[5] State v. Gauthier, 113 Ore. 297, 231 Pac. 144 (1924).

[6] Simmons v. State, 151 Fla. 778, 10 So. 2d 436 (1942).

[7] State v. Wells, 367 S.W.2d 652 (Mo. 1963).

[8] Fields v. State, 203 Ark. 1046, 159 S.W.2d 745 (1942); State v. Grossheim, 79 Iowa 75, 44 N.W. 541 (1890).

[9] *E.g.*, People v. Babcock, 160 Cal. 537, 117 Pac. 549 (1911); *contra,* Whitcher v. State, 2 Wash. 286, 26 Pac. 268 (1891).

[10] *E.g.*, Ind. Ann. Stat. § 10-4201 (1956); Ky. Rev. Stat. § 435.100 (1962); Okla. Stat. Ann. tit. 21, § 1111 (1951).

[11] *E.g.*, Ga. Code Ann. § 26-1303 (1953) (Age 14); Miss. Code Ann. § 2359 (1956) (Age 18); Tenn. Code Ann. § 39-3706 (1955) (Age 21).

of consent is specified, it has generally been held that the act is criminal if the female child has not yet reached puberty.[12] However, where an age is specified, and the girl is below that age, the act is a crime regardless of the fact that she may have attained puberty.[13] A number of statutes, including that of Mississippi, require that the female be previously chaste before a conviction can be sustained.[14] A further requirement for conviction in Mississippi seems to be that the testimony of the prosecutrix must be corrobarated as to the commission of the actual act.[15]

The courts of this country, in keeping with the doctrine that neither intent nor lack of consent are elements of the crime, have uniformly held that mistake as to the age of the girl who consents but is underage constitutes no defense to conviction.[16] As early as 1911, one court hinted that mistake as to age might conceivably be proved as an adequate defense,[17] but that hint was not taken. Mistake is no defense even if the accused has made a good faith effort to ascertain the girl's true age,[18] and even if the girl has falsely represented her age as being above the statutory limit.[19] One reason given for the strict application of the statute seems to be that the act is criminal by virtue of legislative prerogative; as the law making body does not require intent, none is necessary.[20] Mistake, therefore, will not serve to excuse the violator. In prosecutions for other crimes in which the legislature apparently did not provide that intent, *mens rea,* should be required some courts have implied *mens rea* as an element of the crime; authorities are, however, split on this question.[21] The better theory supporting strict application of the statute maintains that error on the part of the defendant as to the girl's age is not an *innocent* mistake of fact. The accused knows the act to be wrong in some degree at the time he commits it, and he will be held responsible for the greater wrong of which he is ignorant.[22] A distinction of this type is illustrated in an adultery case[23] in which the court distinguishes cases in which the accused thought the woman to be his wife, though her actual husband still lived, from cases in which the accused thought the woman to be single, though she was married. In the former cases the accused believed his act to be completely innocent while in the latter, as in statutory rape, he knew some wrong to be attached to the act. Some courts, however, have recognized

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[12]State v. Frey, 76 Minn. 526, 79 N.W. 518 (1899).

[13]State v. Houx, 109 Mo. 654, 19 S.W. 35 (1892).

[14]*E.g.,* Miss. Code Ann. § 2359 (1956); Neb. Rev. Stat. § 28-408 (1956); W. Va. Code Ann. § 5930 (1961).

[15]See Yancey v. State, 202 Miss. 662, 32 So. 2d 151 (1947); *But see* Richardson v. State, 43 Tex. Crim. 302, 65 So. 2d 799 (1944).

[16]*E.g.,* State v. Duncan, 82 Mont. 170, 266 Pac. 400, 405 (1928); Manning v. State, 43 Tex. Crim. 302, 65 S.W. 920 (1901).

[17]Campbell v. State, 63 Tex. Crim. 595, 141 S.W. 232 (1911).

[18]Manning v. State, 43 Tex. Crim. 302, 65 S.W. 920 (1901).

[19]See Edens v. State, 43 S.W. 89 (Tex. Crim. App. 1897).

[20]See Simmons v. State, 151 Fla. 778, 10 So. 2d 436 (1942).

[21]See generally Packer, *Mens Rea and the Supreme Court,* 1962 Sup. Ct. Rev. 107.

[22]See State v. Houx, 109 Mo. 654, 19 S.W. 35 (1892).

[23]State v. Audette, 81 Vt. 400, 70 Atl. 833 (1908).

that the law is not easily applied in all cases of statutory rape.[24] The difficulty arises when the prosecutrix is neither naive nor apparently in need of any legislative protection regarding her sexual behavior. The problem is compounded when the age of consent is relatively high and the girl is within a few months of having attained that age. In such cases it is not easily said that the accused took advantage of the tender years and inexperience of the female. The court in *Hernandez* recognizes these problems. Its decision, to allow evidence of defendant's alleged mistake as to the age of the girl to go to the jury, seems indicative of more modern thinking in the field of law concerned with sexual relations.[25]

Few would disagree that the moral standards of society have become less rigid with passing time. The 17-year-old girl of today is much more advanced in her knowledge of sex than was her counterpart of 10 years ago; furthermore, she is more likely to be mistaken for an older girl. Should a court of law not consider these matters when hearing a case of statutory rape in which mistake as to age is alleged? While no trend can be detected from a single case, a precedent has been set in California at least. It is unlikely that other jurisdictions will hasten to adopt the *Hernandez* rule. It is also doubtful that the defense will be allowed in cases in which the factual situation varies greatly from that of the instant case. That change is sometimes slow can best be seen in the fact that the controlling California case[26] which *Hernandez* overruled was decided in 1896. It is submitted that the decision in the instant case reflects the influence of current standards of morality on a point of law which is itself the product of moral norms, and in so doing affords greater opportunity for justice in like cases.

Don Preston Lacy

EVIDENCE—OFFICER'S ACCIDENT REPORT—EXTENT OF ADMISSIBILITY

In a head-on collision plaintiff's husband and the defendant were killed. Plaintiff filed suit against defendant's estate for the wrongful death of her husband. She alleged and attempted to prove that the accident was caused by defendant's negligence in driving into the wrong lane while intoxicated. Defendant's first witness was the highway patrolman who arrived at the scene shortly after the accident. Confining himself strictly to facts within the patrolman's personal knowledge from observation of the scene, defendant sought to establish the point of collision by evidence that the cars and most of the debris were found in the defendant's lane of traffic. Both on direct[1] and re-direct[2] examination, as well as upon cross examination by the plaintiff, the officer clearly

[24]See State v. Snow, 252 S.W. 629 (Mo. 1923).

[25]See WILLIAMS, CRIMINAL LAW § 73, at 261 (1953); Hall, *Interrelations of Criminal Law and Torts: II*, 43 COLUM. L. REV. 967, 995 (1943); Comment, *Forcible and Statutory Rape*, 62 YALE L.J. 55, 78 (1952).

[26]People v. Ratz, 115 Cal. 132, 46 Pac. 915 (1896).

[1]Record, p. 90, Boyd v. Donald, 167 So. 2d 661 (Miss. 1964).

[2]*Id.* at 95.

indicated that he had no personal knowledge of the cause of the accident nor the relative position of the cars prior to collision. His cross examination also clearly indicated that, except as to facts observed on investigation of the scene, his report consisted only of conclusions or opinions, based on statements and opinions of others.[3] Plaintiff's eyewitness had accounted for the position of the cars by testifying that upon impact the vehicles rose in the air and fell across into the opposite lane. On cross examination plaintiff's attorney asked the patrolman if he had stated in his report that the cars collided in plaintiff's lane. When he denied making such a statement, the report, from which all the patrolman's conclusions except the diagram of the accident had been deleted, was admitted over defendant's objection. HELD: Affirmed. A Mississippi highway patrolman's accident report is not within the class of reports declared inadmissible by section 8170, which refers only to reports of parties; it is admissible for the purpose of impeachment through partly hearsay. *Boyd v. Donald*, 167 So. 2d 661 (Miss. 1964).

During the past several decades, provisions requiring reports of highway accidents by parties and by public officials have been included in the statute books of almost every state.[4] With these provisions have come others rendering such reports confidential and inadmissible in evidence against the parties making them.[5] The policy behind such a privilege is obvious—to encourage the making of full, complete reports.[6] Most courts, however, realizing the strong countervailing need to use all reliable evidence in determining the facts have been slow to extend these sanctions beyond the specific statutory coverage.[7] In states where reports by the parties to an accident are required by statute,[8] but not reports by highway patrol and traffic officers, the privilege statutes have not been held to include the latter type unless containing specific language to that effect.[9] No statute requires a report to be made by the highway patrol in Mississippi, though patrol policy compels one in every accident.[10] Despite strong argument to the contrary by appellant, the court apparently interpreted the reference in section 8170 to "all required accident reports and supplemental reports"[11] to refer only to supplemental reports required under section 8166,[12] giving the Department of Public Safety the right to require "supplemental reports" from parties where the initial required report is not complete.

Though the tenor of the Uniform Rules of Evidence is otherwise,[13] even in the absence of privilege, most states, when not excluding the report as a whole, certainly exclude statements of conclusion in accident

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[3] *Id.* at 91.

[4] 36 MINN. L. REV. 540 (1952).

[5] *E.g.*, TEX. REV. CIV. STAT. ART. 6687(b), § 42 (1960).

[6] MCCORMICK, EVIDENCE § 149 (1954).

[7] *E.g.*, Brown & Root v. Haddad, 142 Tex. 624, 180 S.W.2d 339, 340 (1943).

[8] MISS. CODE ANN. § 8170 (1956).

[9] *E.g.*, Ellison v. Lang Transp. Co., 74 P.2d 512, 514 (Cal. App. 1937).

[10] Letter From T. B. Birdsong, Mississippi Commissioner of Public Safety, to John H. Fox, Jr., Dec. 1, 1964.

[11] See MISS. CODE ANN. § 1870 (1956).

[12] MISS. CODE ANN. (1956).

[13] Uniform Rules of Evidence, rule 63 (15).

reports.[14] There are two basic evidentiary principles urging exclusion.[15] First, the report is obviously made up largely of what other witnesses related to the officer after he arrived at the scene and, thus, is hearsay. Second, the officer is normally not considered an expert witness. Non-expert witnesses are usually competent to make factual statements only, not opinions and conclusions.[16] Nevertheless, there has been certain modification of this general rule of inadmissibility. Reports have been admitted where they contained admissions made to the officer,[17] where the officer is required by law to investigate and make a factual determination,[18] or, as in the court's opinion in the instant case, where offered to impeach the official making the report.[19] Few appellate courts have considered the problem of using accident reports for impeachment purposes, and most of the opinions in such cases fail to adequately delineate the facts involved, rendering it difficult to determine exactly the nature of the point on which the officer is being impeached and how it is being done. Reports appear to have been admitted for impeachment purposes in cases involving contradictory statements about facts to which the officer had testified from personal observation,[20] involving total omission in the report inconsistent with facts to which he had testified,[21] and involving testimony from a report on the stand where it was identified to the jury as the official document.[22] In the latter situation the court felt that the report should be admissible though not "a true attempt to impeach, but rather an effort to discredit by argumentative questions."[23] Other courts, however, have refused to go this far, apparently feeling that less than a true attempt to impeach could only prove that the officer's report was less than complete, while leaving the jury with the impression that it constituted an official determination after investigation by the officer.[24] It would seem that the instant case makes the broadest extension to date of the impeachment exception, for the stated reason that the substantative facts as to which testimony had been given "tended to prove" what occurred, although the officer testified only to facts he observed afterward and on direct examination stated he had no personal knowledge as to what actually happened.[25]

In common with most situations which reach the appellate level,

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[14] 8 Am. Jur. 2d *Automobiles and Highway Traffic* § 959 (1963).

[15] Annot., 69 A.L.R. 2d 1148, 1151 (1960).

[16] See McCormick, Evidence § 10 (1954).

[17] *E.g.*, Finnerty v. Darby, 391 Pa. 300, 138 A.2d 117, 127 (1958).

[18] *E.g.*, Moran v. Pittsburgh-Des Moines Steel Co., 183 F.2d 467, 473 (3d Cir. 1949).

[19] *E.g.*, Austin v. Portland Traction Co., 181 Ore. 479, 182 P.2d 412 (1947).

[20] See Tompson v. Princeton, 272 Wis. 589, 76 N.W.2d 273, 274 (1956); Brown & Root v. Haddad, 142 Tex. 624, 180 S.W.2d 339, 341 (1943), where the officer testified that the car windshield was muddy when his report made conflicting statements.

[21] See Sims v. Struthers, 267 Ala. 80, 100 So. 2d 23, 26 (1957), involving testimony as to skidmarks where the report failed to mention them.

[22] See Friesen v. Schmelzel, 318 P.2d 368, 371 (Wyo. 1957).

[23] *Id.* at 370.

[24] See Wilson v. Bungalow Bar Corp., 285 App. Div. 1191, 141 N.Y.S.2d 106 (1955).

[25] See Boyd v. Donald, 167 So. 2d 661, 663 (Miss. 1964).

the present case involved conflicting equities which had to be balanced. Policy considerations, to a certain extent, dictate that most evidence be admitted which will aid the jury in making their decision. Courts also realize that exclusionary rules are often exceedingly burdensome when balanced against the probability of the injustice they were designed to prevent. In addition, an ancient rule of some merit dictates that he who opens a line of testimony cannot afterwards bar the door. Yet, on the other hand, there is a valid and obvious justification for refusing to allow the ordinary witness to testify to what others have told him or to expound conclusions based upon such testimony. This is especially dangerous in the case of a highway patrolman's accident report, which because of its official nature is prone to carry undue weight with the jury and constitute a de facto extrajudicial determination of the case. Also, under the precedent of the instant ruling, one of the parties may be deprived of the use of his most valuable and competent witness, as to physical facts, by the fear that in putting the reporting officer on the stand he will render admissible unfavorable hearsay, speculation, and opinion. In the present situation, with such an obvious distinction between factual testimony and opinion, it seems questionable whether the court has given these latter values proper consideration. One added factor casting serious doubt on the admissibility of the report in this case is that on its face the admitted copy of the report indicates that it is not the entire report. It might be further argued that the policy of the department in deleting portions of reports containing opinions and conclusions[26] renders the instrument as admitted not a true copy. Were the officer's entire statement available, harmony between his testimony and his report might be shown, not inconsistency or impeachment as when only one opinion or conclusion is inferred from a diagram.

Alfred G. Nicols, Jr.

INSURANCE—MAILING OF NOTICE SUFFICIENT TO EFFECT CANCELLATION

The insured was involved in an accident and upon contacting his local insurance agent was informed that his policy had been cancelled a few days before the accident. Subsequently the alleged insured was sued, and when a judgment was rendered against him he sued the insurance company. The cancellation clause of the insurance policy in question provided that the company could cancel the policy by mailing written notice to the insured stating when the cancellation would be effective and that the mailing of the notice would be sufficient proof of notice. At the trial, an employee of the insurance company testified that she had mailed notice to the insured to the effect that his policy would be cancelled. The court found that the policy had not been effectively cancelled as written notice was never mailed or received and that the insurer's failure to refund premiums estopped them from pleading cancellation. HELD: The mailing of notice of cancellation, and not receipt thereof, in the manner stipulated in the policy was sufficient to effect cancellation, and the payment or tender of the unearned premium was not a condition of cancellation; furthermore, the insured's testimony

[26]Letter from T. B. Birdsong to John H. Fox, Jr., Dec. 1, 1964.

that the notice was not received did not raise a jury question. *Employers Mut. Cas. Co. v. Nosser,* 164 So. 2d 426 (Miss. 1964), *suggestion of error overruled* 168 So. 2d 119.

Whether or not actual receipt is necessary, depends, in the absence of legislation, on the particular policy provision involved.[1] Policies providing for notice of cancellation usually fall into one of the following five types:

> (1) those providing in general terms that the policy may be canceled by giving notice to this effect, without prescribing expressly the form of such notice; (2) those providing that the policy may be canceled by mailing of the notice of cancellation to the insured; (3) those providing that the policy may be canceled by giving notice to the insured of a specified number of days, usually 5; (4) those providing that the policy may be canceled by notice to the insured of a specified number of days but specifically adding thereto that the mailing of notice shall be a sufficient proof of notice of cancellation; and (5) those providing that the policy may be canceled by giving notice to the insured by registered letter.[2]

A standard cancellation clause provides that a policy may be cancelled by mailing notice to the insured stating that such cancellation will be effective in not less than five days thereafter.[3] One line of authority holds that the mailing of notice of cancellation is not sufficient and that actual receipt of notice by the insured must be shown.[4] Courts of this opinion usually rely on a statute requiring actual receipt,[5] yet the Minnesota court has unequivocally adopted this view without the aid of a statute.[6] The court stated that if a policy can be cancelled by merely mailing notice of cancellation without regard to whether or not it is received, the object of the notice may be completely nullified and there may be no chance of fulfilling the object sought in obtaining insurance.[7] Another line of authority is that the receipt of notice of cancellation after it has been mailed in accordance with the policy provision is not a condition precedent to cancellation.[8] The courts seem to base this holding upon the theory that parties entering into an insurance contract are deemed to have designated the government, in its operation of the mails, as the agent of the insured for the purpose of receiving the notice of cancellation.[9] To hold that actual receipt is necessary would be undertaking to change the terms of the contract[10]

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[1]See Medord v. Pacific Nat'l Fire Ins. Co., 189 Ore. 617, 219 P.2d 142, *petition for rehearing denied,* 189 Ore. 617, 222 P.2d 407 (1950).

[2]Annot., 64 A.L.R. 2d 962, 993 (1959).

[3]29 AM. JUR. *Insurance* § 386 (1960).

[4]Farmers Ins. Exchange v. Taylor, 193 F.2d 756 (10th Cir. 1952).

[5]Galkin v. Lincoln Mut. Cas. Co., 279 Mich. 327, 272 N.W. 694 (1937).

[6]Donarski v. Lardy, 251 Minn. 358, 88 N.W.2d 7 (1958).

[7]*Id.* at 12.

[8]Service Fire Ins. Co. v. Markey, 83 So. 2d 855 (Fla. 1955).

[9]See Dent v. Monarch Life Ins. Co., 231 Mo. App. 283, 98 S.W.2d 123 (1936).

[10]See Wright v. Grain Dealers Nat'l Mut. Fire Ins. Co., 186 F.2d 956 (4th Cir. 1950).

and to place additional words in the policy far beyond the actual terms agreed upon.[11]

Where testimony is present that the notice was mailed and also testimony that it was not received there seems to be a conflict of authority. One line of authority is that testimony of mailing of notice raises a rebuttable presumption that it was received;[12] however, testimony of failure to receive a letter raises a rebuttable presumption that the letter was not mailed, and thus a question of fact is presented to be determined by the trier of facts.[13] This position is based upon the Wigmore rule which is that testimony of non-receipt of a letter is some evidence it was never mailed.[14] There are some Mississippi cases which have applied this rule, although cancellation of an insurance policy was not involved.[15] In essence these cases hold that, while a presumption arises that a letter was received after being properly stamped, addressed, and placed in the post office, this presumption may be rebutted by evidence showing the letter was in fact never received.[16] Other jurisdictions have applied this rule to cases involving cancellation of insurance policies.[17] On the other hand, another line of authority follows the rule that testimony to the effect that notice is mailed is sufficient to establish the fact of mailing notice as a matter of law.[18] The proponents of this view recognize that a presumption arises where testimony indicates that notice, properly stamped and addressed, was mailed and insist that the presumption cannot be rebutted by testimony that notice was never received.[19] This rule seems to completely disregard the insured's testimony of non-receipt.[20] Courts taking this position usually require testimony that notice was never mailed in addition to testimony of non-receipt in order to rebut the presumption of mailing.[21] The court in the instant case adopted the view that the presumption is not rebutted by testimony of the insured that he never received notice.[22] This can be seen from the statement in the opinion that the evidence of mailing was undisputed testimony of mailing.[23]

Some courts have said that the insurer is under no obligation to use reasonable diligence in getting actual notice of cancellation to the insured if the policy provision is strictly followed.[24] Today, when insurance plays such a large role in society, it appears rather unjust to

[11]Midwestern Ins. Co. v. Cathey, 262 P.2d 434, 436 (Okla. 1953).

[12]Keller v. Provident Life & Acc. Ins. Co., 213 S.C. 339, 49 S.E.2d 577 (1948).

[13]Keeling v. Travelers Ins. Co., 180 Okla. 99, 67 P.2d 944 (1937).

[14]WIGMORE, EVIDENCE § 2519 (3d ed. 1940).

[15]See, *e.g.*, Young v. Westphalen & Co., 111 Miss. 765, 72 So. 193 (1916).

[16]*Ibid.*

[17]Allied American Mut. Fire Ins. Co. v. Paige, 143 A.2d 508 (D.C. Munic. App. 1958).

[18]See Wright v. Grain Dealers Nat'l Mut. Fire Ins. Co., 186 F.2d 956 (4th Cir. 1950).

[19]See Seaboard Mut. Cas. Co. v. Profit, 108 F.2d 597 (4th Cir. 1940).

[20]*Ibid.*

[21]See Cherokee Ins. Co. v. Hardin, 202 Tenn. 110, 302 S.W.2d 817 (1957).

[22]Employers Mut. Cas. Co. v. Nosser, 164 So. 2d 426, 437 (Miss. 1964).

[23]*Ibid.*

[24]*E.g.*, Westmoreland v. Gen. Acc. Fire & Life Assur. Corp., 144 Conn. 265, 129 A.2d 623 (1957).

hold that cancellation can be brought about by the mere mailing of notice without any requirement of receipt. Thus a person may be involved in an automobile accident and suddenly find himself faced with large expenses such as hospital and medical bills and even lawsuits when he thought he had adequate coverage. It has been contended that the method of cancellation in question promotes the effectiveness of the operation of the insurance industry which otherwise would place a burden upon insurance companies and extra costs upon policy holders.[25] In accordance with Chief Justice Lee's dissent, it is submitted that the instant case will license insurance companies to become the judge and jury as to whether or not notice of cancellation is mailed.[26] Perhaps a solution to the harshness of this decision is for the legislature to enact a statute requiring insurance companies to send all notices of cancellation by registered mail or to have the burden of proving that the insured actually received the notice.

Aleita Ann Sullivan

Internal Revenue—Business Expense Deductions—Frustration of Policy

The taxpayer, a Mississippi contractor of unimpeachable reputation and high standards of business ethics, was engaged in the business of servicing operating oil wells. His entire income for the tax year 1956, came from this business; the taxpayer was in no manner engaged in any phase of a business involving intoxicating liquors. For the tax year in question the taxpayer deducted for income tax purposes, as a business expense, $1,038.92 spent for whiskey. The whiskey was served to customers in the course of entertainment or was given to customers for business purposes. The whiskey was purchased and consumed in Mississippi. It was the general custom of the taxpayer's competitors and other businessmen throughout the state to entertain with, and make gifts of whiskey to, present and potential customers for the purpose of business promotion. The Commissioner of Internal Revenue disallowed the deduction as not ordinary and necessary; and, secondly, that this deduction would tend to frustrate a well defined public policy of the State of Mississippi. Held: Deduction allowed. Expenditures for whiskey to entertain present and potential customers were deductible as an ordinary and necessary business expense, since there is an absence of a sharply defined public policy in the state on serving and donating intoxicating liquor. *Stacy v. United States*, 231 F. Supp. 304 (1963).

Deductions from a taxpayer's gross income, in the determination of taxable income, are a matter of legislative grace and shall be allowed only where there is a clear provision in the Internal Revenue Code making possible the allowance of the particular deduction.[1] A taxpayer

[25]Risjord, *Construction of Terms of Liability Insurance With Specific Reference to the Cancellation Condition*, 38 Texas L. Rev. 198, 202-03 (1959).

[26]Employers Mut. Cas. Co. v. Nosser, 164 So. 2d 426, 448 (1964) (dissenting opinion).

[1]New Colonial Ice Co. v. Helvering, 292 U.S. 435 (1934).

claiming such a deduction has the burden of justifying the item as being properly deductible by reference to an applicable statute and by showing that it comes within the terms of that statute.[2] One of the deductions for which the Code makes specific provision is "all ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business."[3] A reasonable expense may be ordinary and necessary if it is appropriate and helpful in the development and maintenance of the taxpayer's business.[4] Factors to consider in determining whether the expense is ordinary and necessary are the kind of transaction involving the expenditure, the general custom and practice of the business community, and the customs and practices of the business under examination.[5] The Internal Revenue Code does not expressly provide for deductions of entertainment expenses from gross income, but, if these expenses fulfill all the requirements for an expense paid or incurred in carrying on a trade or business, a claim by a taxpayer for such a deduction will be allowed.[6] A particular expense cannot be ordinary and necessary, thereby qualifying as a deductible expense incurred or paid in carrying on a trade or business, if the deduction would tend to frustrate a sharply defined national or state policy prohibiting a particular type of conduct.[7] The Supreme Court of the United States has determined that the public policy of a state is to be found in its constitution, the acts of its legislature, and the decisions of its courts.[8] An expenditure will not be nondeductible merely because it is remotely indicative of an illegal act, for the test of nondeductibility is the severity and immediacy of the frustration resulting from the allowance of the deduction; clearly, the most complete and direct frustration of state policy results when the expenditure for which the deduction is sought is itself prohibited by statute.[9]

The State of Mississippi has a statute which makes it unlawful to keep, have in possession, sell, or give away intoxicating liquors;[10] however, the state does tax the sale of liquor, by taxing all illegal sales.[11] A tax on the sale of intoxicating liquor is not deemed inconsistent with the illegal status of whiskey, for the fact that the sale and traffic of liquor is illegal does not prevent the state from placing a tax on the sale of whiskey.[12] The imposing of a tax on the sale of liquor does not detract from the power of the state to make the selling, bartering, or giving away of intoxicating liquor illegal.[13] State statutes similar to those in this state were held to be a sufficient manifestation of policy to deny deduction, as an ordinary and necessary business expense, for expendi-

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[2]White v. United States, 305 U.S. 281, 292 (1938).

[3]Int. Rev. Code of 1954, § 162.

[4]Welch v. Helvering, 290 U.S. 111 (1933).

[5]Deputy v. du Pont, 308 U.S. 488, 495 (1940).

[6]United States v. Winters, 261 F.2d 675 (10th Cir. 1958).

[7]Lilly v. Commissioner, 343 U.S. 90 (1952).

[8]Building Serv. Employees Int'l Union, Local 262 v. Gazzan, 339 U.S. 532 (1950).

[9]Tank Truck Rentals, Inc. v. Commissioner, 356 U.S. 30 (1958).

[10]Miss. Code Ann. § 2613 (1956).

[11]Miss. Code Ann. § 10108.01 (1956).

[12]State *ex rel.* Melton v. Romback, 112 Miss. 737, 73 So. 731 (1917).

[13]Smith v. Commissioner, 33 T.C. 861 (1960).

tures made in the purchase of liquor, used either for the entertainment of customers or for business gifts, when the sale, gift, or use of the liquor was within the state.[14] The rule would appear to be, following the decision in the *Stacy* case, that the practices and activities of the residents of a state will indicate the policy of that state, even if in conflict with state statutes which specifically prohibit such practices and activities. There being no state policy frustrated by an expenditure made in violation of the statute, that expenditure, though illegal, will be deductible as a business expense, if it is otherwise ordinary and necessary.

A reasonable interpretation of the statutes, judicial decisions, and the practices of the residents of the State of Mississippi indicates that there can be no completely consistent determination of state policy concerning the sale and use of intoxicating liquor within the state. The weight of authority, determined by legislative pronouncements and the consistent judicial decisions on the matter, seems to be that there is a state policy involving intoxicating liquors. Public policy would be sharply frustrated by the allowance of a deduction for a single expenditure, if made for the purchase of whiskey, when used for the entertainment of customers, or for business gifts if that purchase, use, or gift is made in the state. Following the accepted rule that any deduction from income is a matter of legislative grace and the strict interpretation of the Internal Revenue Code, it would be a much more desirable determination of this issue if the manifest desires of the people, evidenced by the long prohibition of liquor, were promoted by a tax policy which would tend to discourage expenditures made for the purchase of intoxicating liquors. The disallowance, as a business expense, of any expenditure for whiskey, would serve such a purpose. A suggested result was reached by the Tax Court in the finding ". . . that Mississippi, in its prohibition laws has an established and sharply defined policy, which would be frustrated and violated by the allowance of the deduction claimed by the petitioner for the amount expended by him for intoxicating liquors, which liquors were given to customers, all in the State of Mississippi."[15]

Vincent Blackwell

Torts—Negligence—Manufacturer's Liability—Requirement of Privity

Plaintiff, an employee of the Navy Department, was test-driving a pick-up truck manufactured by defendant and sold to the Navy Department when the truck overturned because of its allegedly defective construction. This action for personal injuries was brought on the basis of negligence. The trial court, finding that there was no privity between the injured party and the manufacturer, sustained defendant's motion for a directed verdict. Held: Reversed. Privity is not required under Mississippi law in an action against a manufacturer for personal injuries suffered as a proximate result of a latent defect in the manufacturer's product. *Necaise v. Chrysler Corp.*, 335 F.2d 562 (5th Cir. 1964).

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[14]United States v. Winters, 261 F.2d 675 (10th Cir. 1958).

[15]Smith v. Commissioner, 33 T.C. 861, 867 (1960).

The general rule that privity is a requisite to maintaining a negligence action against a manufacturer for injury proximately caused by the manufacturer's defective product was enunciated by way of dictum in an 1842 English case.[1] Although the privity requirement was accepted in most American jurisdictions, exceptions were quickly engrafted upon the original doctrine. The New York court held that privity was not necessary to render a manufacturer liable when his product was inherently dangerous,[2] an inherently dangerous product being one whose danger is derived from the nature of the product itself, such as an explosive,[3] a firearm,[4] or an inflammable.[5] The exception has been extended to injuries resulting from contamination of a product intended for human consumption.[6] The most telling blow to the original nonliability rule came with the decision in *MacPherson v. Buick Motor Co.*,[7] where the rule was announced that a manufacturer could be held liable without privity when the product was not inherently dangerous but would constitute a menace if defectively made. Some courts, asserting that the broad exception announced in *MacPherson* has virtually engulfed the original rule, have completely repudiated the privity requirement.[8] The Restatement of Torts, joining the movement toward strict liability in product liability actions,[9] appears to take the position that privity of contract is an inappropriate requirement in a tort action.[10]

The Mississippi court, while declaring that generally there is no manufacturer's liability in the absence of privity with the injured party,[11] is undoubtedly committed to the exception to this general rule in the case of products intended for human consumption,[12] including tobacco,[13] although the court's rationale in one such decision referred to a warranty running with title to the product.[14] It appears that Mississippi also recognizes the exception with regard to inherently dangerous products,[15] but it is the single remaining jurisdiction which has not made a definite

[1]Winterbottom v. Wright, 10 Mees. & W. 109, 111, 152 Eng. Rep. 402, 403 (Ex. 1842).

[2]Thomas v. Winchester, 6 N.Y. 397, 57 Am. Dec. 455 (1852).

[3]See Frazier v. Ayres, 20 So. 2d 754 (La. 1945).

[4]See Walker v. National Gun Traders, Inc., 116 So. 2d 792 (Fla. 1960).

[5]See Gulf Refining Co. v. Williams, 183 Miss. 723, 185 So. 234 (1938).

[6]Ketterer v. Armour & Co., 247 Fed. 921, 926 (2d Cir. 1917); Jackson Coca-Cola Bottling Co. v. Chapman, 106 Miss. 864, 64 So. 791 (1914).

[7]217 N.Y. 382, 111 N.E. 1050 (1916).

[8]See, *e.g.*, C. D. Herme, Inc. v. R. C. Tway Co., 294 S.W.2d 534 (Ky. 1956); Carter v. Yardley & Co., 319 Mass. 92, 64 N.E.2d 693 (1946).

[9]Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1103 (1960).

[10]*Cf.* RESTATEMENT, TORTS § 395 (1934).

[11]Ford Motor Co. v. Myers, 151 Miss. 73, 117 So. 362 (1928).

[12]Jackson Coca-Cola Bottling Co. v. Chapman, 106 Miss. 864, 64 So. 791 (1914).

[13]Pillars v. R. J. Reynolds Tobacco Co., 117 Miss. 490, 78 So. 365 (1918).

[14]Coca-Cola Bottling Works v. Lyons, 145 Miss. 876, 883, 111 So. 305, 307 (1927). Mississippi recognizes strict liability on the basis of warranty in food products cases.

[15]See E. I. Du Pont De Nemours & Co. v. Ladner, 221 Miss. 378, 73 So. 2d 249 (1954); Gulf Refining Co. v. Williams, 183 Miss. 723, 185 So. 234 (1938).

election to follow the *MacPherson* rule of liability where the product is not considered to be inherently dangerous.[16] Although the Mississippi court has not faced the question squarely since its rejection of the *MacPherson* doctrine in 1928, an examination of subsequent cases indicates the question is not finally settled. Even though the decision in *E. I. Du Pont De Nemours & Co. v. Ladner*[17] was rendered in favor of the defendant manufacturer because of an efficient intervening cause not foreseeable by the manufacturer, the court, nevertheless, stated that liability could be present without the requirement of privity. The United States Court of Appeals for the First Circuit seized upon the dictum in that case and held that Mississippi would now follow the *MacPherson* rule,[18] and the Fifth Circuit Court reached the same conclusion.[19] The Mississippi Supreme Court, however, as recently as 1962,[20] refused to accept the *MacPherson* doctrine, and persisted in invoking the inherently dangerous concept.[21] In the instant case, the court, in making an "educated guess" as to the law in Mississippi, chose to follow the course indicated by the *Du Pont* dictum to the effect that privity is not required in a product liability action in Mississippi even though the product is not inherently dangerous.

Any valid reasons which might have been the basis for invoking the privity of contract doctrine in the nineteenth century have long since been completely overshadowed by the growth of huge industrial complexes. In a society where a multitude of varied products are produced on a mass scale, where distribution is on a nation-wide level, and there are necessarily more middle-men between the manufacturer and the consumer, it is an isolated occasion when the user of a product will deal directly with the product's manufacturer. While it is not contended, as some do,[22] that there should be strict liability because of the manufacturer's better ability to sustain and spread such losses, it is submitted that the extension of the negligence theory to cover the Navy Department's employee in the instant case is merited.

Emmett Neil Young

WORKMEN'S COMPENSATION—LUMBER INDUSTRY—TESTS APPLIED TO DETERMINE WHETHER LOGGER IS INDEPENDENT CONTRACTOR OR EMPLOYEE

The Crosby Lumber and Manufacturing Company, owner and operator of a large saw mill, had considerable timber acreage. Its crews cut the timber, but Crosby entered into successive short-term contracts with others to load and haul the logs from the woods to the mill.

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[16] 1 FRUMER & FRIEDMAN, PRODUCTS LIABILITY 23 (1964).

[17] 221 Miss. 378, 399, 73 So. 2d 249, 254 (1954).

[18] Mason v. American Emery Wheel Works, 241 F.2d 906, 910 (1st Cir. 1957).

[19] Grey v. Hayes-Sammons Chemical Co., 310 F.2d 291, 297 (5th Cir. 1962); see also 28 MISS. L.J. 250 (1957), concluding that the privity requirement no longer pertains in Mississippi.

[20] See Harrist v. Spencer-Harris Tool Co., 244 Miss. 84, 140 So. 2d 558 (1962).

[21] Cox v. Laws, 244 Miss. 696, 702, 145 So. 2d 703, 706 (1962).

[22] See Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944) (concurring opinion).

Durham, an alleged independent contractor, was under a two month's written contract to haul the logs. The contract in question provided, *inter alia*, that the mill operator was to have no control over the manner in which the logs were hauled and that the company was interested only in the completed result. The method of payment was set at twice monthly on a unit basis. The facts indicated that the company directed where the logs were to be located, limited the time of hauling, inspected the premises, and occasionally directed the contractors to pick up logs left behind. Furthermore, the company sold supplies to Durham and deducted the price from his pay. Durham hired the claimant Boyd and two others, fixed their rate of pay, set their work hours, and paid them personally. In addition, he directed them in the hauling operations. While working in the woods under Durham, Boyd sustained injuries for which this claim was filed. The attorney referee concluded that Durham was an independent contractor and that Boyd was an employee of the contractor and not of the company, and thus not entitled to compensation. On appeal, the full commission reversed, holding that Boyd was an employee of the company. The circuit court reversed the commission and reinstated the order of the attorney referee. HELD: Reversed. Even though a contract between a mill owner and a log hauler specified that the former was to have no control over the latter, evidence of control by the mill owner in addition to the fact that the work performed was an integral part of the regular business of the employer warranted a finding that the hauler was an employee of the mill and thus entitled to workmen's compensation. *Boyd v. Crosby Lumber & Mfg. Co.*, 166 So. 2d 106 (Miss. 1964).

Payment of benefits under workmen's compensation law is specifically limited to employees acting within the course of employment.[1] When the Mississippi Workmen's Compensation Act was passed in 1948, an employee was defined as "any person, including a minor whether lawfully employed in the service of an employer under any contract of hire or apprenticeship, written or oral, express or implied."[2] There was no provision and no mention whatsoever of independent contractors. The Mississippi Supreme Court approached the problem of determining employment status under the existing rules of respondeat superior applicable to the master-servant relationship.[3] Under the doctrine of vicarious tort liability, a master was held liable for his negligent servant only when he had the right to control the servant.[4] Generally speaking, the right to control, not the actual exercise of control, of the details of the work was said to be the primary test used to determine whether a worker was an independent contractor or servant.[5] The principal components of the control test are: (1) the ultimate right of control, (2) the form of payment, (3) the supplying of equipment, and (4) the

[1]MISS. CODE ANN. § 6998-04 (Supp. 1962).

[2]Miss. Laws 1948, ch. 354, § 2.

[3]Carr v. Crabtree, 212 Miss. 656, 55 So. 2d 408 (1951); Crosby Lumber & Mfg. Co. v. Durham, 181 Miss. 559, 179 So. 285 (1938).

[4]Crosby Lumber & Mfg. Co. v. Durham, 181 Miss. 559, 179 So. 285 (1938); Kisner v. Jackson, 159 Miss. 424, 132 So. 90 (1931).

[5]Kisner v. Jackson, 159 Miss. 424, 132 So. 90 (1931). See generally Comment, *Employee or Independent Contractor?*, 26 MISS. L.J. 250 (1955).

right to fire.[6] The control test, with all of its various elements,[7] has been applied by the court after the passage of the act to determine whether a worker was in fact an independent contractor and thus excluded from the operation of the act, or whether he was an employee entitled to the benefits provided by the act.[8] Applying the control test to the lumber industry, both before and after the act, the court has usually held a logger to be an independent contractor when it appears that he is under contract to the mill,[9] buys his own equipment,[10] hires his own helpers,[11] works at a unit price,[12] pays his own expenses,[13] and directs his own employees.[14] In fact, under the established usage and custom, the lumber industry of Mississippi considers the log hauler under such circumstances to be an independent contractor in business for himself.[15] Moreover, many of the factors urged upon the court as supporting a conclusion of employment status have been expressly rejected, such as: (1) that the operation was an essential part of the business,[16] (2) that the contract could be terminated at any time by either party,[17] (3) that the logger was told where the logs were to be placed,[18] (4) that deductions were made from pay,[19] (5) that the mill owner inspected the premises,[20] (6) that the logger lacked financial substance,[21] (7) that the mill determined what logs were to be hauled,[22] and (8) that the work was an integral part of the business.[23]

The theory of workmen's compensation legislation is to provide a workman with protection from losses resulting from injury by awarding him a fixed amount, depending upon the type of injury, on the basis of status as an employee rather than on the basis of negligence or fault.[24] The underlying philosophy is that the cost of employee injuries should be borne by the industry as a part of the cost of production rather than by the injured workmen.[25] Beginning with Justice Lee's expressed

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[6]1 LARSON, WORKMEN'S COMPENSATION § 44.00 (1964).

[7]RESTATEMENT (SECOND), AGENCY § 220 (1958).

[8]Bardwell v. Perry Timber Co., 222 Miss. 854, 77 So. 2d 708 (1955); Simmons v. Cathey-Williford & Jones Co., 220 Miss. 389, 70 So. 2d 847 (1954); Carr v. Crabtree, 212 Miss. 656, 55 So. 2d 408 (1951).

[9]*E.g.*, Carr v. Crabtree, 212 Miss. 656, 672, 55 So. 2d 408, 413 (1951).

[10]Bardwell v. Perry Timber Co., 222 Miss. 854, 77 So. 2d 708 (1955).

[11]Carr v. Crabtree, 212 Miss. 656, 671, 55 So. 2d 408, 413 (1951).

[12]E. L. Bruce Co. v. Hampton, 225 Miss. 242, 83 So. 2d 101 (1955).

[13]See Employers Liab. Ins. Co. v. Haltom, 235 Miss. 74, 108 So. 2d (1959).

[14]Simmons v. Cathey-Williford & Jones Co., 220 Miss. 389, 70 So. 2d 847 (1954).

[15]DUNN, MISSISSIPPI WORKMEN'S COMPENSATION § 75 (1957).

[16]Employers Liab. Ins. Co. v. Haltom, 235 Miss. 74, 108 So. 2d 29 (1959).

[17]Stovall v. A. Deweese Lumber Co., 222 Miss. 833, 77 So. 2d 291 (1955).

[18]See Bardwell v. Perry Timber Co., 222 Miss. 854, 77 So. 2d 708 (1955).

[19]See Stovall v. A. Deweese Lumber Co., 222 Miss. 833, 77 So. 2d 291 (1955).

[20]E. L. Bruce Co. v. Hampton, 225 Miss. 242, 83 So. 2d 101 (1955).

[21]Carr v. Crabtree, 212 Miss. 656, 672, 55 So. 2d 408, 414 (1951).

[22]Stovall v. A. Deweese Lumber Co., 222 Miss. 833, 77 So. 2d 291 (1955).

[23]Employers Liab. Ins. Co. v. Haltom, 235 Miss. 74, 108 So. 2d 29 (1959).

[24]See Cudahy Packing Co. v. Parramore, 263 U.S. 418 (1923).

[25]1 LARSON, WORKMEN'S COMPENSATION § 43.51 (1964).

preference for a liberal construction of the act,[26] which acknowledged its basic purpose, the court has been increasingly ready to find employment under the control test, where in the past no such result would have been reached.[27] In several cases a shift in emphasis can be observed to those factors of the control test which, by a liberal interpretation, would indicate employment.[28] Apparently, after rejecting the relative nature of the work test,[29] the court, while still adhering to the control test, resorted to some of the factors of the former to find the requisite control for employment status, emphasizing especially the fact that the work done was an integral part of the business of the employer.[30] The rationale underlying the relative nature of the work test is that one who performs an essential step in the regular operation of the employer should be considered an employee.[31] The factors involved in this standard are: (1) the nature of the worker's job, (2) the skill of the worker, (3) whether the operation is capable of financing its own accident burden, (4) whether the work is a separate calling or business, (5) whether the work is continuous or sporadic, and (6) whether the duration of the work amounts to a continual service as opposed to a contract for a completed result.[32] Applying this test, employment status will be found where the work done is an integral part of the business of the employer and where the worker does not furnish an independent business enterprise.[33] In the present case, the court stressed the continuity of the service and the fact that the work was "regular, recurring, substantial, and exclusive. . . ."[34] The relative nature of the work test, although the court often refers to it as the integral part of the business test, has been relied on to find an employer-employee relationship in the case of a gravel hauler,[35] salesman,[36] and newsboy.[37] The decision of the subject case, while professing to retain the control test, indicates that the relative nature of the work test is on an equality with it in ascertaining employment status under the Mississippi act.[38]

It should be noted that the legislature on April 6, 1956, amended

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[26]Carr v. Crabtree, 212 Miss. 656, 673, 55 So. 2d 408, 414 (1951) (separate opinion).

[27]See Employers Ins. Co. v. Dean, 227 Miss. 501, 86 So. 2d 307 (1956); Marter v. Cathey-Williford & Jones Co., 225 Miss. 118, 82 So. 2d 724 (1955); Sones v. Southern Lumber Co., 215 Miss. 148, 60 So. 2d 582 (1952).

[29]See Kughn v. Rex Drilling Co., 217 Miss. 434, 64 So. 2d 582 (1953). See also Carr v. Crabtree, 212 Miss. 656, 55 So. 2d 408 (1951).

[30]See Employers Ins. Co. v. Dean, 227 Miss. 501, 86 So. 2d 307 (1956); Marter v. Cathey-Williford & Jones Co., 225 Miss. 118, 82 So. 2d 724 (1955); Sones v. Southern Lumber Co., 215 Miss. 148, 60 So. 2d 582 (1952). See also Wade v. Traxler Gravel Co. 232 Miss. 592, 100 So. 2d 103 (1958); Shumpert Truck Lines v. Horne, 227 Miss. 648, 86 So. 2d 499 (1956); Laurel Daily Leader, Inc. v. James, 224 Miss. 654, 80 So. 2d 770 (1955).

[31]1 LARSON, WORKMEN'S COMPENSATION § 45.00 (1964).

[32]1 LARSON, WORKMEN'S COMPENSATION § 43.52 (1964).

[33]Boyd v. Crosby Lumber & Mfg. Co., 166 So. 2d 106, 111 (Miss. 1964).

[34]*Ibid.*

[35]Wade v. Traxler Gravel Co., 232 Miss. 592, 100 So. 2d 103 (1958).

[36]Kahne v. Robinson, 232 Miss. 670, 100 So. 2d 132 (1958).

[37]Laurel Daily Leader, Inc. v. James, 224 Miss. 654, 80 So. 2d 770 (1955).

[38]Boyd v. Crosby Lumber & Mfg. Co., 166 So. 2d 106, 111 (Miss. 1964).

the act to expressly exclude independent contractors[39] and that this occurred after the recent liberal trend toward finding employment where heretofore a clearly independent contractor relationship existed. At the time of this amendment loggers, under the usual arrangement, were consistently placed in the status of independent contractors, a fact which would seem to indicate the legislative intent to exclude the logger from the act. The court seems to be inconsistent in distinguishing *Crosby Lumber & Mfg. Co. v. Durham* on the ground that it was decided prior to the act, while at the same time declining to overrule it, when in fact, the court has cited and followed it in several cases after the act holding loggers to be independent contractors. Although the court appears to use the terms interchangeably, it is submitted that there is a possibility of distinction between the "relative nature of the work test" and the "integral part of the business test." Since this decision may cause drastic and perhaps far reaching changes in the entire lumber industry of Mississippi—in effect abolishing the small heretofore independent contractor as well as revolutionizing the mill owner's operation—the fear has been expressed that lawyers as well as representatives of the lumber industry will be in a quandry when called upon to draft or define an independent contractor relationship. To end the possibility of confusion, one solution would be for the court to either follow the prior decisions under the traditional control test holding the logger to be an independent contractor, or emphatically overturn them in favor of the relative nature of the work test holding the logger to be an employee of the mill. In the present state of development, it may be expected that the court will continue to apply the control test to the usual logging arrangement and resort to the relative nature of the work test only when control is conspicuously absent or when the court feels that the independent contractor relationship is simply a facade designed to evade the effects of workmen's compensation law.[40]

James W. Burgoon, Jr.

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[39]Miss. Laws 1956, ch. 344. See generally Shanahan, *Amendments To The Workmen's Compensation Act 1956-1958*, 30 Miss. L.J. 105 (1959).

[40]See generally Comment, *The Employment Relation In Workmen's Compensation and Employers Liability Legislation*, 10 U.C.L.A. L. Rev. 161 (1962).

RECENT BOOKS

CONCEPTS OF INSANITY IN THE UNITED STATES—1789-1865. Norman Dain. New Brunswick: Rutgers University Press, 1964. Pp. xv, 304. $9.00.

On July 1, 1954, a three-judge panel of the District of Columbia Circuit Court of Appeals handed down its opinion in the case of *Durham v. United States*.[1] By their decision, the judges overruled a precedent which had stood in the District of Columbia since 1882.[2] This would not call for an unusual degree of comment, by itself, in view of the readiness of superior courts in America to reverse or overrule their prior decisions, if satisfied that they no longer reflect any relevant, or cogent, public policy.[3] The *Durham* decision, however, has come to stand as a landmark in the growth of the criminal law. It has been cited in innumerable decisions and has formed the subject matter of many law journal articles.[4] It has been praised,[5] as well as soundly condemned.[6] It shook both Bench and Bar out of their lethargy, and forced them to grapple anew with fundamental principles of the criminal law.

In *Durham* the court became the first United States Court in this century to repudiate the *M'Naghten* Rule as a test of criminal insanity. It was compelled to the conclusion that *M'Naghten* provided "an inadequate guide to mental responsibility for criminal behavior," and accordingly, felt itself obliged to reformulate the test in a more adequate manner.[7]

Following on *Durham*, the entire question of the "insanity defense" in criminal matters has become the subject of great activity and discussion. *M'Naghten* has come under attack repeatedly in the various jurisdictions, with greater or less success. *Durham* itself has become the subject of severe criticism.[8] All in all, if called upon to sum up the developments of this past decade, the student of the criminal law might be tempted to express enthusiasm and describe them as "progress."

Professor Dain's book comes accordingly, at a timely moment. While it is not the main objective of his book, he raises a frequently obscured, yet crucial issue—the inter-relationship of community attitudes towards "insanity" with the development and operation of the insanity defense at the trial level.

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[1]214 F.2d 862 (D.C. Cir. 1954).

[2]12 D.C. 498, 550; 1 Mackey 498, 550 (1882). See Durham v. United States, *supra* note 1, at 869.

[3]Douglas, *Stare Decisis* in THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK (1949) reprinted in ESSAYS IN JURISPRUDENCE FROM THE COLUMBIA LAW REVIEW 18 (1963).

[4]Goldstein & Katz, *Abolish the "Insanity Defense"—Why Not?* 72 YALE L.J. 851, 853 n.5 (1963).

[5]See, *e.g.*, Bazelon, 53 GEO. L.J. 4, 12 (1964).

[6]See Ehrenzweig, *Psychoanalysis of the Insanity Plea*, 73 YALE L.J. 425, 429 n.15 (1963) for a bibliography.

[7]See Durham, *supra* note 1, at 871.

[8]See articles cited in note 6.

Professor Dain's purpose in writing this book is to trace the development of treatment of mental patients, and the effect of popular attitudes on psychiatric thought during the period 1789-1865. At many points, however, he focuses his attention on "the interaction of psychiatric with popular ideas"[9] in the context of criminal trials held during this period. It is the purpose of this review to consider issues raised by these trials which are still troubling the law in the light of Professor Dain's comment that:

> In many respects the attitudes gaining acceptance among today's psychiatrists correspond more closely to those that existed in pre-Civil War days than in pre-World War II days. Many current therapeutic techniques . . . are in effect a reintroduction of the moral treatment of the mid-nineteenth century. At the same time the American public, though no longer grossly misinformed about mental illness, differs little in its attitudes from the public of a century ago.
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> If an insane person commits a crime . . . he is protected from legal punishment because he is not held legally liable for his behavior. Many citizens, regarding crime with a vengeful spirit and insanity as divine retribution for sin, have found this exemption hard to accept. They have demanded that the criteria for legal insanity protect as few offenders as possible. Others have feared that recognizing the irresponsibility of the insane violated the concepts of free will and moral accountability and undermined Judeao-Christian morality."[10]

The law is today confronted with a growing body of literature on the question of popular attitudes to mental illness. These studies reveal that to the majority of people, ". . . mental illness *is* a very threatening, fearful thing and not an idea to be entertained lightly by anyone. Emotionally, it represents to people loss of what they consider to be *the* distinctively human qualities of rationality and free will. . . ."[11] This attitude has two consequences—firstly, the majority of people seek to justify behavior by rational criteria as long as possible—only in cases of extreme behavior do the majority of people classify the actor as mentally ill.

The second consequence of significance to the criminal law is the emotional response toward such illness. As Dr. Star observes, ". . . mental illness is something people want to keep as far from themselves as possible."[12]

Of what significance is such information to the legal process? What role does the jury perform in "insanity" cases? Is its function a socially desirable one? Even if we knew the answers, would they make any difference, *i.e.*, since the answer is a moral judgment about the criminal

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[9]DAIN, CONCEPTS OF INSANITY IN THE UNITED STATES—1789-1865 xiii (1964) [hereinafter cited as DAIN].

[10]DAIN xii, xiii.

[11]Star, The Public's Ideas About Mental Illness 6, Nov. 1955 (unpublished paper presented to Nat'l Ass'n of Mental Health Annual Meeting, copy in author's library).

[12]*Ibid.*

process, would empirical evidence of an unfavorable nature alter our judgment? Would removing the decision from juries and vesting it elsewhere, most probably in a panel of psychiatrists, be preferable? The answers to these questions rest on the answers given to another series of questions: (a) What is the rationale underlying the criminal process? (b) What is the policy behind the insanity defense? (c) Are they, in the final analysis, indistinguishable, as Professors Goldstein and Katz argue?[13] If they are distinguishable, is the compassionate philosophy revealed by Judge Bazelon's dictum that

> The legal and moral traditions of the western world require that those who, of their own free will and with evil intent (sometimes called mens rea), commit acts which violate the law, shall be criminally responsible for those acts. Our traditions also require that where such acts stem from and are the product of a mental disease or defect . . . . moral blame shall not attach, and hence there will not be criminal responsibility.[14]

the basis for the distinction? In any event, are we not forced to agree with Goldstein and Katz that:

> What must be recognized is the enormous ambivalence toward the "sick" reflected in conflicting wishes to exculpate and to blame; to sanction and not to sanction. . . .[15]

This ambiguity in attitude is dealt with by Dr. Dain in terms of class. He concludes that by the 1820's "the upper and middle classes accepted the concepts of moral treatment more readily than the poor and uneducated," who ". . . probably retained many of the prejudices and superstitions of the past."[16] This "cultural lag" is ascribed to the lack of education provided in this field. With regard to the whole picture of the period surveyed, Dr. Dain sums up: "The public concept of insanity remained generally vague and amorphous throughout the pre-Civil War period." Further, the "optimistic state of mind . . . reflected less of a spectacular public swing from pessimism to optimism than a moderately successful attempt by a relatively small group of people to re-educate laymen to a more hopeful and informed outlook. . . ."[17]

Professor Dain is not impressed by the role the legal profession played in regard to the social problems created by mental illness:

> On the whole, however, the courts remained a stronghold of reactionary attitudes, and jurists did not usually base their opinions upon contemporary medical information, despite the increased use of psychiatrists as expert witnesses. Most people

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[13]Goldstein & Katz, *supra* note 4, at 859-72.

[14]Durham, *supra* note 1, at 876.

[15]Goldstein & Katz, *supra* note 4, at 868-69.

[16]Dain 49-52.

[17]Dain 203. For current problems involving social status, see Hollingshead & Redlich, Social Class and Mental Illness (1958); Joint Commission on Mental Illness and Health, Action for Mental Health (1961); Strodtbeck, James & Hawkins, *Social Status in Jury Deliberations*, 22 Am. Soc. Rev. 713 (1957).

> still expected an insane person to have no more reason or thought than a brute animal or to be totally wild and ungovernable.[18]

While it is dubious whether strictures that harsh could fairly be made against the legal profession today, there is, nevertheless, a weakness which, conceivably, nullifies all exertions—our virtually total ignorance of public attitudes and prejudices in regard to the mentally ill. In regard to the jury, we are still ignorant of the impact of public attitudes to mental illness on its deliberations.[19]

This ignorance as to the workings of the jury is surprising, in view of the importance attached to the institution in America. The sixth amendment expressly provides that "In all criminal prosecutions the accused shall enjoy the right to speedy and public trial, by an impartial jury of the State and district. . . ."[20] Clearly, trial by jury is a fundamental public policy in the United States. But what is the precise nature of this policy? The jury has been frequently criticized as prejudiced, inefficient, and irrational.[21] Even if it is not, with specific reference to insanity pleas, is it enough to entrust the decision to the wisdom of the common man? Particularly if by virtue of his ignorance he is quite inadequately prepared to decide, even with the aid of psychiatric testimony? Few of us understand and fewer still are able to adequately identify the nature of our emotional responses. Does not this policy deliberately expose the accused to those impulses of aggression and retribution which are constituent elements of everyone's "total personality"? The jury meets in private, and in secret; it gives no reasons for its conclusions. It is not *permitted* to explain itself. Nevertheless, its decision is conclusive as to facts, and "insanity" is a question of fact. As Albert Ehrenzweig observes: "Only the jury, which for this reason will remain indispensable, can be hoped to interpret for us society's subconscious needs."[22] Is not the legal profession still open to the accusation that: "At times lawyers challenged the special competence of psychiatrists to judge legal insanity."?[23]

Despite a growing awareness of social attitudes towards the mentally ill, the Nunnally-Osgood Survey revealed that ". . . the general public regards the mentally ill with fear, distrust, and dislike";[24] nevertheless,

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[18]DAIN 198. See generally DAIN 45-49, 73-83, 197-98, 208-09.

[19]From this criticism must be excluded Harry Kalven and his associates in the Chicago Jury Project. The results of this Project are just reaching the journal and publishing houses. When more of their work is available, it will become even more evident that discussion on this topic can ignore their findings at its own peril. For a bibliography to date, see Kalven, *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055, 1056 n.3 (1964). See also Simon, *Mental Patients as Jurors*, 22 HUMAN ORGANIZATION 276 (1964) for a supplementary bibliography.

[20]U.S. CONST. amend. VI.

[21]See FRANK, COURTS ON TRIAL (1949); see Kalven, *supra* note 18, at n.2, for bibliography.

[22]Ehrenzweig, *Psychoanalysis of the Insanity Plea*, 73 YALE L.J. 425, 439 (1964).

[23]DAIN 198.

[24]JOINT COMMISSION ON MENTAL ILLNESS AND HEALTH, ACTION FOR MENTAL HEALTH 74 (1961). In a letter to the author, Dr. Shirley A. Star, who was associated with the National Opinion Research Center during this research, where

the legal profession has continued to view the jury in an optimistic light. Both the District of Columbia and the Third Circuit specifically formulated the issue as one of facilitating and improving the performance of the jury's function. In *Durham* the court considered the policy basis for the jury as well:

> Finally, in leaving the determination of the ultimate question of fact to the jury, we permit it to perform its traditional function which, as we said in Holloway, is to apply "our inherited ideas of moral responsibility to individuals prosecuted for crime . . . ."[25]

Juries will continue to make moral judgments, still operating under the fundamental precept that "our collective consciences does not allow punishment where it cannot impose blame. But in making such judgments, they will be guided by wider horizons of knowledge concerning mental life . . . ."[26]

If, as I have suggested, the function of the jury as a social institution is not consistent with the benevolent social philosophy which has inspired the courts, what alternatives are available to effectively implement this policy? One such alternative would be to hand over persons accused of "crimes" to a panel representing various disciplines—psychiatry, psychology, social work, sociology, etc. The jury would make findings on the factual foundation necessary for further proceedings, *i.e.*, did the accused commit the overt acts alleged? From there he would be transferred for disposition to the panel, constituting the most adequately-trained people available with regard to problems of the human mind. They would rule on his mental state and recommend to the court what they regard as the most advantageous disposition of the case, and why.[27]

The reaction to propositions of this nature is predictable. Jacques Barzun has formulated policy objections in the following manner:

> . . . the law has in view persons while science deals with objects. It follows that in science inquiry knows no restrictions—all available evidence must be brought to bear and exclusionary rules are merely silly. Likewise, in dealing with nature all stratagems and devices are permissible. But the law forbids this catch-as-catch-can. It does not inquire by any and all means. Having no instruments, it understands the fallibility and the impressionability of the human mind and it protects the accused

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she undertook research of great significance, observed ". . . when the first excitement about the Durham Rule arose, I predicted on the basis of our results, that juries given that rule would still proceed in the same fashion they had formerly—unable to accept a defense of insanity for a superficially appearing rationally motivated crime." (Letter to author, Dec. 20, 1964). For empirical research findings coroborating this view, see James, *Juror's Assessment of Criminal Responsibility*, 7 SOCIAL PROBLEMS 58, 63-67 (1959).

[25]Durham, *supra* note 1, at 876.

[26]*Ibid.*

[27]For an elaboration of a scheme along these lines see Diamond, *From M'Naghten to Currens, and Beyond*, 50 CALIF. L. REV. 189 (1962).

> by limiting what shall come within the purview of judge and jury.[28]

In any event, whatever the merits of this alternative, the sixth amendment probably precludes its adoption to establish either (a) that sentencing is not comprehended by the wording of the amendment, or alternatively (b) that sentencing has ceased to be punitive—*i.e.*, "criminal" in nature, would be hard to maintain at this time—tremendous progress in penal reform is necessary, before society can reach that level of achievement.

The question remains, however, why we cling to the jury, as reflecting a more "liberal" social philosophy than psychiatric panels. The argument does not confront this question directly, preferring to assume qualities in the jury system, about which empirical study reveals uncertainty. To argue that the retention of the jury reflects a moral judgment by the legal profession that ultimately the people ought to decide the fate of offenders against society avoids the issue—why do they hold such views? In any event, Drs. Rita Simon and Wendell Shackelford report that 38% of lawyers polled by them preferred the final verdict in "insanity" cases to rest with a panel of medical and legal experts, as opposed to 39.2% who preferred a jury, while 11.3% preferred medical experts and 7.6%, a judge.[29] Thus the profession itself would appear to be divided. It is at least arguable that those lawyers who voted for a panel of medical and legal experts did so because they regarded it as more likely to operate benevolently than the jury.

On the other hand, it is conceivable that the 39.2% of lawyers voting for the jury did so for the same reason. The difficulty is, no one really knows why lawyers fight so strongly for the retention of the jury. But, even if we did, and the reason could be shown to be fallacious, would this be persuasive of the desirability for change? It seems unlikely —the American Bar has a soft spot for the jury, the roots of which lie very deep. Professor Harry Kalven and his associates in the Chicago Jury Project have made a closer study of the jury than anyone else alive. Professor Kalven concludes that:

> In the course of the many years of that study it should be clear that I, personally, have become increasingly impressed with the humanity, strength, sanity and responsibility of the jury.[30]

The answers to these questions will not be known for many years, and nothing is gained by abolishing an institution because of ignorance as to its dynamics. Until a clearer picture of the function and performance of the jury as a social institution, and its interrelationship with the operation of the "legal system" becomes available, it would be undesirable to tinker with the mechanism. Concern for the benevolent values embodied in mental health programs and in the concept of "insanity"

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[28]Barzun, Book Review, 73 YALE L.J. 194, 196 (1963).

[29]Simon & Shackleford, The Defense of Insanity: A Survey of Legal and Psychiatric Opinion (unpublished paper, copy in possession of author, to appear in PUBLIC OPINION QUARTERLY, Summer 1965).

[30]Kalven, 50 VA. L. REV. 1055, 1075 (1964).

itself should not result in piecemeal adjustments in the jury system. Perhaps, in the long run, there will be no need to interfere with the jury to achieve the goals of mental health reformers.

One immediate aspect of the mental health field in need of attention is the improvement of public attitudes toward the mentally ill. As the Joint Commission on Mental Illness and Health points out:

> An important point has been missed in over-insistence that the public recognize that mentally ill persons are sick, the same as if they were physically sick, and should be treated no differently from other sick persons. Mental illness is different from physical illness in the one fundamental aspect that it tends to disturb and repel others rather than awake their sympathy and desire to help.[31]

Their recommendation would be an immediate alternative to the dilemma of the jury in insanity cases—the hope of rehabilitation against the desire to punish:

> To overcome society's many-sided pattern of rejecting the mentally ill, by making it clear that the major mentally ill are singularly lacking in appeal, why this is so, and the need consciously to solve the rejection problem.[32]

For the lawyer who is concerned with the problem of mental health, Professor Dain draws a fascinating picture of its historical background. The interrelationship of religious, moral, social, and legal attitudes toward the mentally ill, and the impact of personal prejudice on theoretical explanations are preceptively presented. Professor Dain's description of the trial of William Freeman is a chastening experience.[33] This book is a significant contribution to a better understanding of "insanity" as a social, as well as a legal, problem in the United States.

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[31] JOINT COMMISSION ON MENTAL ILLNESS AND HEALTH, ACTION FOR MENTAL HEALTH, xviii (1961).

[32] *Ibid.*

[33] DAIN 199-200.

LAWYERS IN POLITICS. Heinz Eaulau and John D. Sprague. New York: The Bobbs-Merrill Company, Inc., 1964. Pp. 158.

Some books take a question and try to answer it but never quite succeed. This is not one of those books. It does answer its question adequately, with skill, care, and sophistication of analysis. The question of concern to Messrs. Eulau and Sprague stems from a fact long observed about state legislatures: there always tend to be a large number of lawyers in any legislative body. Does this make a difference in anything? Are lawyers in a legislature different from non-lawyers? Do they act differently from non-lawyers in their attitude toward, and in their voting on, public policy issues that come before the legislature? It has always been assumed (and after this book that is the only word we can use) that lawyer-legislators were in fact different in their acts and attitudes from non-lawyer-legislators. This book says they are not, and the evidence for that answer, appropriately marshalled in the form of charts, tables, graphs and words, takes something better than one hundred pages to present. (The remaining fifty or so pages in the book state the question and summarize the answers other people have given to the question.)

A few years back a group of professional students of politics got together in a cooperative study of four state legislatures. They were interested in looking into various aspects of these legislatures and in the process of making their study accumulated a large body of data. It is in this accumulation of data that Eulau and Sprague find the evidence for the statements they make in this book.

From studying this data on state legislators, they find, among other things, that lawyer-legislators have gone to school longer, are better off financially, and are somewhat younger than non-lawyer-legislators. They also find that lawyer-legislators are quite as interested in being re-elected to office as their non-lawyer colleagues (thus refuting the commonly-held notion that a major reason a lawyer goes into politics is simply to make a name for himself and thus drum up business for his law practice which is actually his first love and to which he will return just as soon as he can gracefully retire from politics).

The question still remains: why are there so many lawyers in legislatures, or in politics generally for that matter? Or putting it another way: why does politics seem to be so attractive to lawyers? Eulau and Sprague insist that the question is badly put. They find that the lawyer's interest in politics comes first and then his decision on law as a profession. They find that lawyers in the legislature, much more so than non-lawyers, recall having developed at least a mild interest in politics as a child, and that in general their interest in politics develops much earlier than does that of non-lawyer-legislators. Among the lawyers interviewed in the four state legislatures studied, it was common to find those who picked their interest (politics) first and then because of their interest picked their profession (law). As one respondent put it: "I picked my major in college with an eye on politics. I started out as a chemistry major but switched to law after my first year." Equally interesting is the finding by Eulau and Sprague that the families of lawyer-legislators were more active in politics than were the families of non-lawyer-legislators.

In short, the evidence is strong that it is not so much that lawyers

find politics attractive as that many who have political aspirations think of law as a logical career to follow.

So much so for the immediate findings. What conclusions can be drawn from the work done? The findings—at some risk of oversimplification—may be summarized as follows: lawyer-politicians do not differ *much* from politicians who are not lawyers. This seems to answer the immediate question the authors of the book started out to answer. But is that all there is to it? Eulau and Sprague think that to leave the matter there would be unfortunate. In a concluding chapter they return to the question that has actually been only partly answered: why are there so many lawyers in politics? The answer the authors give can be summarized in the single word "convergence." Once more at risk of oversimplification one may say that what they mean by this is that politics and law as professions share many things in common and that the kind of job one does as a lawyer (the kind of role one plays) is at many points much like the job one does (the role one plays) as a politician. To get more on this point the best place to look is at the final chapter of the book.

For the lawyer-reader, or even for the non-lawyer-reader, the book may contain one disturbing fault: it is written by two behavioralist-oriented political scientists who sometimes use a vocabulary (convergence, role, socialization, dysfunctional consequences, etc.) that is second-nature to them but may on occasion get in the way of understanding on the part of the reader who is not used to the vocabulary. Other than that this book is a marvel of organization and skilled analysis and is very clear in saying what it has to say.

The question of "lawyers in politics: so what?" may not be earth-shattering in importance, but it is one that has excited some curiosity on the part of those whose interest is law, politics, or both, and such is the thoroughness and skill with which the analysis here has been done that the adjective "definitive" is not inappropriate to apply to the treatment this book has given its subject.

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MISSISSIPPI WORKMEN'S COMPENSATION—SELECTED CASES. Sylvester John Hemleben. University, Mississippi: Department of Research in Business and Government, University of Mississippi, 1964. Pp. 196. $7.15.

The nineteenth century, dawn-to-dusk, non-union working man was so taken with laissez-faire values (or hunger?) that he took all the risks of injury. Only rarely did a "negligent" employer pay for one of his men's work-connected mishaps—the injured's personal tragedy, his lost pay, and the resulting social losses which befall a destitute family and their community.

Today the cost of the product bears the blood of the workman.[1] Government has caught up with galloping industry; the cost of industrial injuries are shared by charging losses to production expenses.

Mississippi's Workmen's Compensation Act, like others, does not shift all the costs from injured to employer and consumer. The most liberal of the state compensation acts allow the disabled workman two-thirds of his wage loss. All limit the payable period and set a maximum wage for purposes of computing compensation. Employer, employee, and consumer share these economic losses under government plans designed to insure prompt and certain recovery, at minimum expense. Mississippi's act puts part of the wage loss on consumers, but the plan also keeps the social costs of on-the-job accidents to a minimum.

Mississippi lawmakers were the nation's last to pass laws forcing employers to insure their workers against wage losses from work-connected injuries. (Prior to 1949, Mississippi's negligence law had been liberalized by the legislature and the courts so that the plaintiff workman had some of the courtroom advantages given railroad workers under the FELA.) When the state joined the compensation club in 1948, Mississippi judges and administrators got the job of deciding which workers, and what injuries, are favored by the benevolent (but often vague) words of the Mississippi act.

Professor Hemleben's choice sampling of Mississippi Supreme Court decisions sketch the breadth of the protection that the 16-year-old compensation law has given accident victims. *Mississippi Workmen's Compensation—Selected Cases,* though aimed at law students, will interest anyone curious about compulsory insurance plans, or the vital role of courts and agencies in administering Mississippi's "compromise" between lawsuit-wary enterpreneurs and their injured employees.

Selected Cases initial opinion[2] indicates, and the remainder of the casebook proves, that Mississippi's Supreme Court has liberally applied the state's act; its decisions have consistently expanded the accordian-

[1]The theory of workmen's compensation was expressed in the slogan attributed to David Lloyd George: "The cost of the product should bear the blood of the workman." PROSSER, TORTS § 69, at 383 (2d ed. 1955); Bohlen, *A Problem in the Drafting of Workmen's Compensation Acts*, 25 HARV. L. REV. 328, 401, 517 (1912). See also Stertz v. Industrial Ins. Comm'n, 91 Wash. 588, 590, 158 Pac. 256, 258 (1916): "All agreed that the blood of the workman was a cost of production, that the industry should bear the charge."

[2]L. B. Priester & Son, Inc. v. Dependents of Bynum, 244 Miss. 185, 141 So. 2d 246 (1962); HEMLEBEN, MISSISSIPPI WORKMEN'S COMPENSATION—SELECTED CASES 6 (1964) [hereinafter cited as HEMLEBEN].

like phrases of the Jackson lawmakers—"accidental injury or accidental death arising out of and in the course of employment"[3]—to give more protection to more workers, and for more kinds of injuries. Hemleben's first selection concerns a wife's claim for death benefits. Her husband was found dead at the repair shop where he worked—an hour after normal closing time. The two doctors who testified didn't know the cause of death; neither had seen the deceased after his death. Mississippi's highest court granted the wife's claim: The judges *presumed* a connection between the job and the death.

The act is not always so flexible; some specific exclusions are included: farm laborers remain unprotected, as do domestic servants and handicapped persons in workshop programs sponsored by the department of public welfare. Independent contractors are also excluded from the act's coverage. *Selected Cases* shows that the distinction between independent contractors and employees is as fuzzy as always—"independent contractor" means what the court says it means, from case to case. Fortunately for the injured, "independent contractors" grows smaller, "employees" gets bigger. In a recent decision included in *Selected Cases*,[4] the Mississippi Supreme Court approved a claim against a Georgia trucking company that merely leased a truck and driver (the injured) from a Mississippi firm for some interstate hauling.

The heart attack cases show a similar from-the-heart trend. At first the Mississippi courts could find no connection between job-time heart attacks and the claimant's work. But of late another presumption has appeared. This one requires the boss to prove the heart attack wasn't work-connected. And if the more conservative Workmen's Compensation Commission lets the employer get by with too light a burden of proof, the Mississippi Supreme Court reverses on appeal.[5]

The responses of the act's interpreters to these and similar problems are expertly classified and arranged in *Selected Cases*—the first and only casebook in Mississippi's Workmen's Compensation. Increased industrial activity means more industrial injuries. Mounting claims propel prospective lawyers to study Workmen's Compensation laws and related welfare legislation. Hemleben's casebook presents Mississippi's leading cases and lesser-knowns in a way that students will be hard-pressed not to learn.

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[3]Miss. Code Ann. § 6998.02 (supp. 1962).

[4]Burnham Van Service, Inc. v. Dependents of Moore, 164 So. 2d 733 (Miss. 1964); Hemleben 54. See 36 Miss. L.J. 113 (1964).

[5]*E.g.*, Russell v. Sohio Southern Pipe Lines, Inc., 236 Miss. 722, 112 So. 2d 357 (1959); Hemleben 109.

MISSISSIPPI'S LEADING CONSTITUTIONAL DECISIONS. Huey B. Howerton. University, Miss.: The University of Mississippi, 1964. Pp. 171. $3.00.

At a time when the constitutional decisions of the United States Supreme Court make most of the headlines and claim most of the attention, it is good to have this volume to help re-establish a better perspective concerning the significant developments in the area of constitutional interpretation in our own state. For when all is said and done, many of the decisions covered in this study have had a more direct impact on the lives of individual Mississippians and in the shaping of our state's political and economic development than have most of the broader-based holdings of the Court in Washington.

For the selection of the cases that make up this timely symposium, Dr. H. B. Howerton has been able to rely on a lifetime of close acquaintance with the subject matter. As student and teacher of state and national government, the long-time head of Ole Miss's Department of Political Science is uniquely qualified to publish this volume. In fact, it would not be too far-fetched to suggest that some of the principles of government that he has enunciated in the classroom may have found their way, as a result of his influence, into some of the decisions reported in the instant book.

In any event, whether or not the Howerton influence extended to the actual shaping of any of the decisions in the first place, it is enough that it has expressed itself in their selection for this publication. It would appear no coincidence to those of us who know the author that he would devote more space to the articles on the bill of rights and the legislature than to any other. For the decisions involving these articles, dealing as they do more directly with the relationship of the individual to his state government than the more procedural articles on the executive, the judiciary, and the lengthy general provisions of the constitution, reflect the author's long-felt and often-expressed concern for the exercise of the highest degree of responsibility at the state and local level for the protection of the rights of the individual.

As the author points out in his introductory remarks to the chapter on the bill of rights, the processes of enforcing the guarantees of this article, which reaffirms practically all of the original Bill of Rights of the United States Constitution, should be a matter of greatest priority for the state. The incorporation of this article in the state constitution implies effective implementation. Otherwise as Dr. Howerton suggests, the people will find the federal government moving further to effectuate these purposes. The maintenance of a proper balance through responsible and effective action at all levels of government remains then the great and overriding task for more citizens who decry federal control without at the same time acknowledging local responsibility.

In his treatment of the legislature Dr. Howerton acknowledges its primacy because of the broad base of power from which it functions. This would appear to be a power base that the court has helped to expand at least in part. For in the land-mark case of *Hunt v. Wright*,[1] cited in this volume, the court has taken the position that from a constitutional standpoint the formal processes by which the legislature arrives

[1] 70 Miss. 298, 11 So. 608 (1892); HOWERTON, MISSISSIPPI'S LEADING CONSTITUTIONAL DECISIONS 77 (1964) [hereinafter cited as HOWERTON].

at a given result are not the proper subject of judicial review. This is perhaps the only rational position that the judiciary could take on this matter in the face of the numerous detailed constitutional limitations which have been imposed on the legislature. It nevertheless clears the way for literally thousands of violations of the express provisions of the constitution at every legislative session and forms the basis for the somewhat cynical attitude of many legislators often expressed in the rhetorical question, "What's the constitution among friends?"

In any event, the range of issues involving the legislative segment of the constitution is extremely broad and encompasses such diverse but far-reaching constitutional questions as those posed in the cases upholding the BAWI bond-issue program,[2] the state retail sales tax,[3] and the grant of public funds to sectarian hospitals.[4]

In his chapter on the executive Dr. Howerton seizes the opportunity to deliver a part of the lecture that so many of his ex-students will remember from the classroom. The message that comes through loud and clear here is that Mississippi has too great a proliferation of executive duties and responsibilities. The author's recommended first steps to correct this situation are: (1) a shorter ballot, (2) reduction and consolidation of agencies, and (3) a merit system.[5] If Howerton, the objective constitutional analyst, seems to become Howerton, the special pleader, at this point, let no one misunderstand. For this is a message worth getting, and it just might be the most important thing in this very significant volume.

The selected cases under the section on the executive form an interesting pattern in that most of them deal with the governor's powers as they relate directly or indirectly to criminal law-enforcement. Of the eleven cases cited, eight involve some aspect of criminal law. The two best-remembered decisions, the Rankin County "Gold Coast" case[6] and the Prentiss County "Recall Law" litigation,[7] arose out of liquor law violations, recalling the comment of one wag that Mississippi booze leads to headaches for governors who would stop it as well as for those anonymous citizens who insist on drinking it.

In the chapter on the judiciary, which includes incidentally several cases involving the boards of supervisors, one comes to the conclusion, on the basis of the cases selected at least, that this is an area of the constitution that has not been the subject of as much recent interpretation as those articles relating to other divisions of government. For of the fifteen cases discussed only one is less than twenty years old. But the case[8] which provided the exception presented literally a space-age question: What relief can be sought in redistricting a county under the

[2]Albritton v. City of Winona, 181 Miss. 75, 178 So. 799 (1938); HOWERTON 61.

[3]Notgrass Drug Co. v. State *ex rel.* Rice, 175 Miss. 358, 165 So. 844 (1936); HOWERTON 92.

[4]Craig v. Mercy Hosp.—Street Memorial, 209 Miss. 427, 47 So. 2d 867 (1950); HOWERTON 80.

[5]HOWERTON 97.

[6]State v. McPhail, 182 Miss. 360, 180 So. 387 (1938); HOWERTON 102.

[7]State *ex rel.* Patterson v. Board of Supervisors, 234 Miss. 26, 105 So. 2d 154 (1958); HOWERTON 111.

[8]Glass v. Hancock County Election Comm'n, 156 So. 2d 825 (Miss. 1963); HOWERTON 126.

impact of population changes resulting from a rocket-testing installation?

As the final chapter points out, the very length of Mississippi's constitution makes it subject to judicial interpretation on a wide variety of subjects that would not normally be thought of in terms of constitutional law. Because there are so many sections of the constitution there is a correspondingly large number of cases. The problem in a volume of this kind then is obviously one of selectivity. Who really can say with absolute authority where the line should be drawn in this regard? As noted earlier, none is better qualified to draw it than the author of this publication, and for his effort, which no one who knows him can doubt was a pure labor of love, the lawyers, public officials, students of government, and plain citizens of our state owe him a lasting debt of gratitude.

William F. Winter
Treasurer, State of Mississippi
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BOOKS RECEIVED

CONTINGENT FEES FOR LEGAL SERVICES. F. B. Mackinnon. New York: Aldine Publishing Co., 1964. Pp. 233. $6.00.

THE CPA PLANS FOR THE FUTURE. John L. Carey. New York: American Institute of Certified Public Accountants, 1965. Pp. X, 533. $5.00.

A LIFE IN MY HANDS. J. W. Ehrlich. New York: G. P. Putnam's Sons, 1965. Pp. 379. $5.95.

OCCUPATIONAL DISEASES, A GUIDE TO THEIR RECOGNITION. Edited by W. M. Gafafer. Washington: U.S. Government Printing Office, 1964. Pp. 324. $2.25.

TAX PLANNING FOR 1965. Edited by Staff, The Journal of Taxation. New York: The Journal of Taxation, Inc., 1964. Pp. 244. $7.50.

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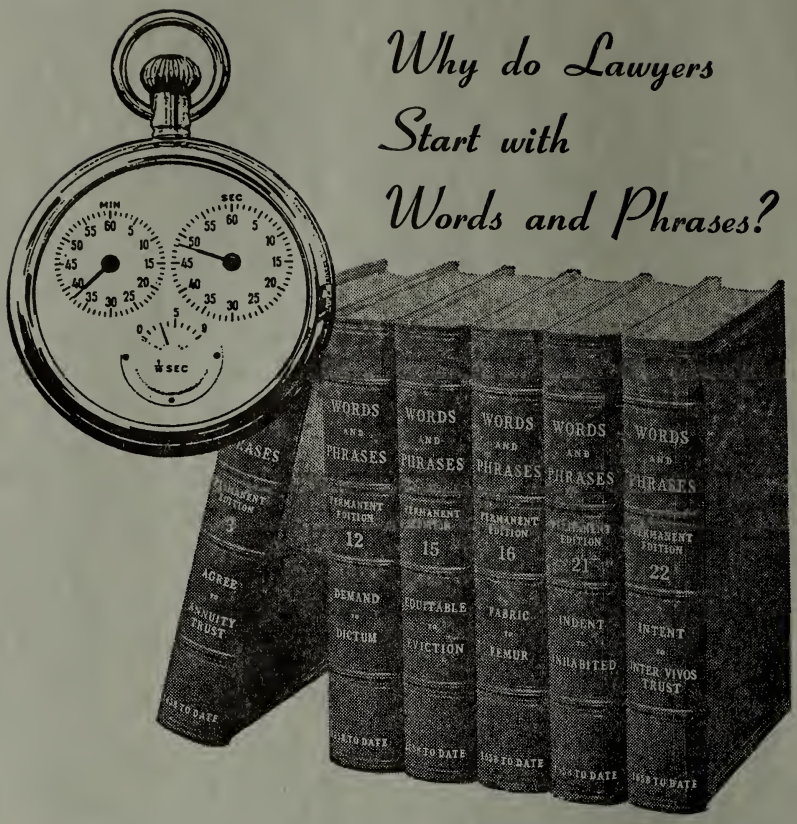

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